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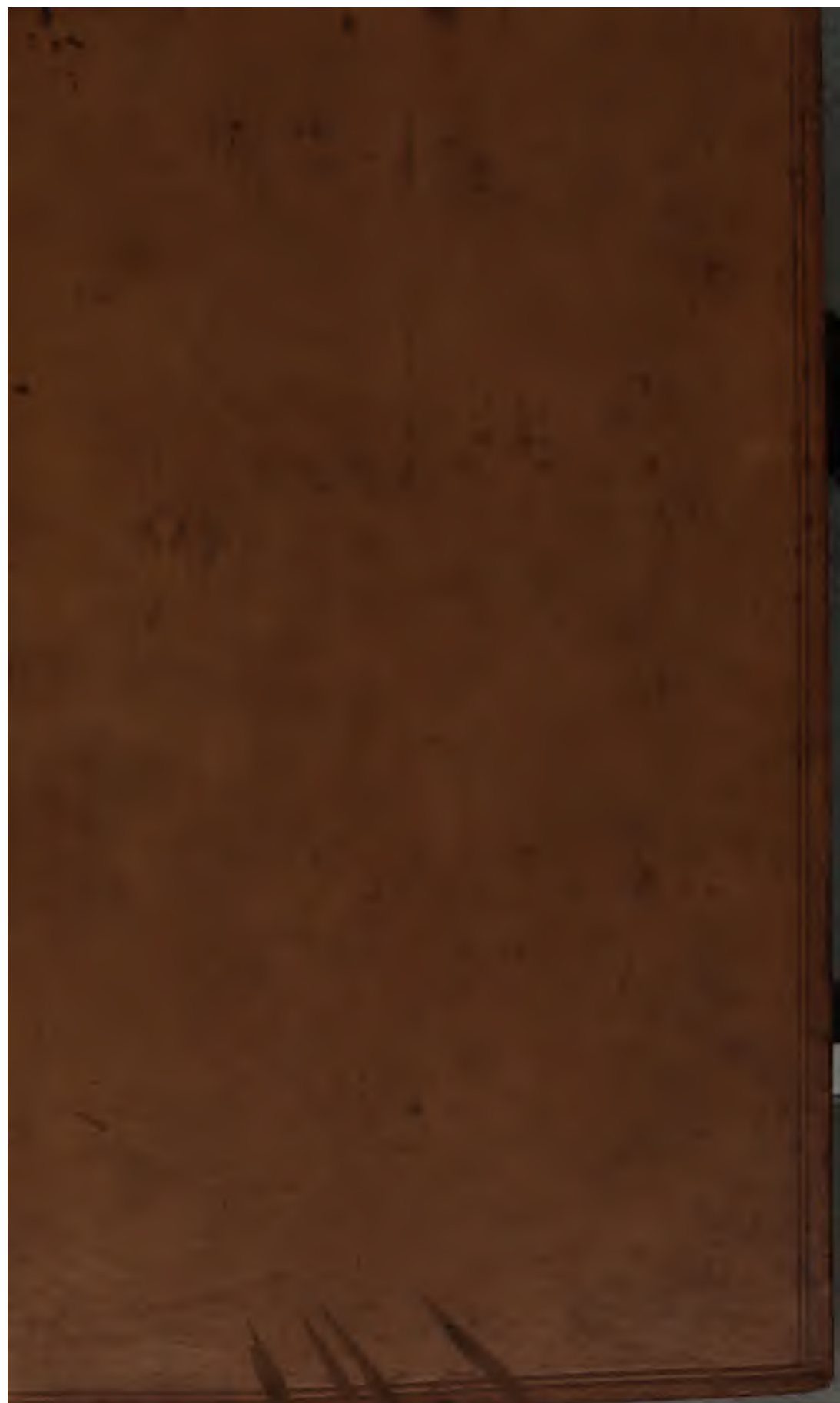
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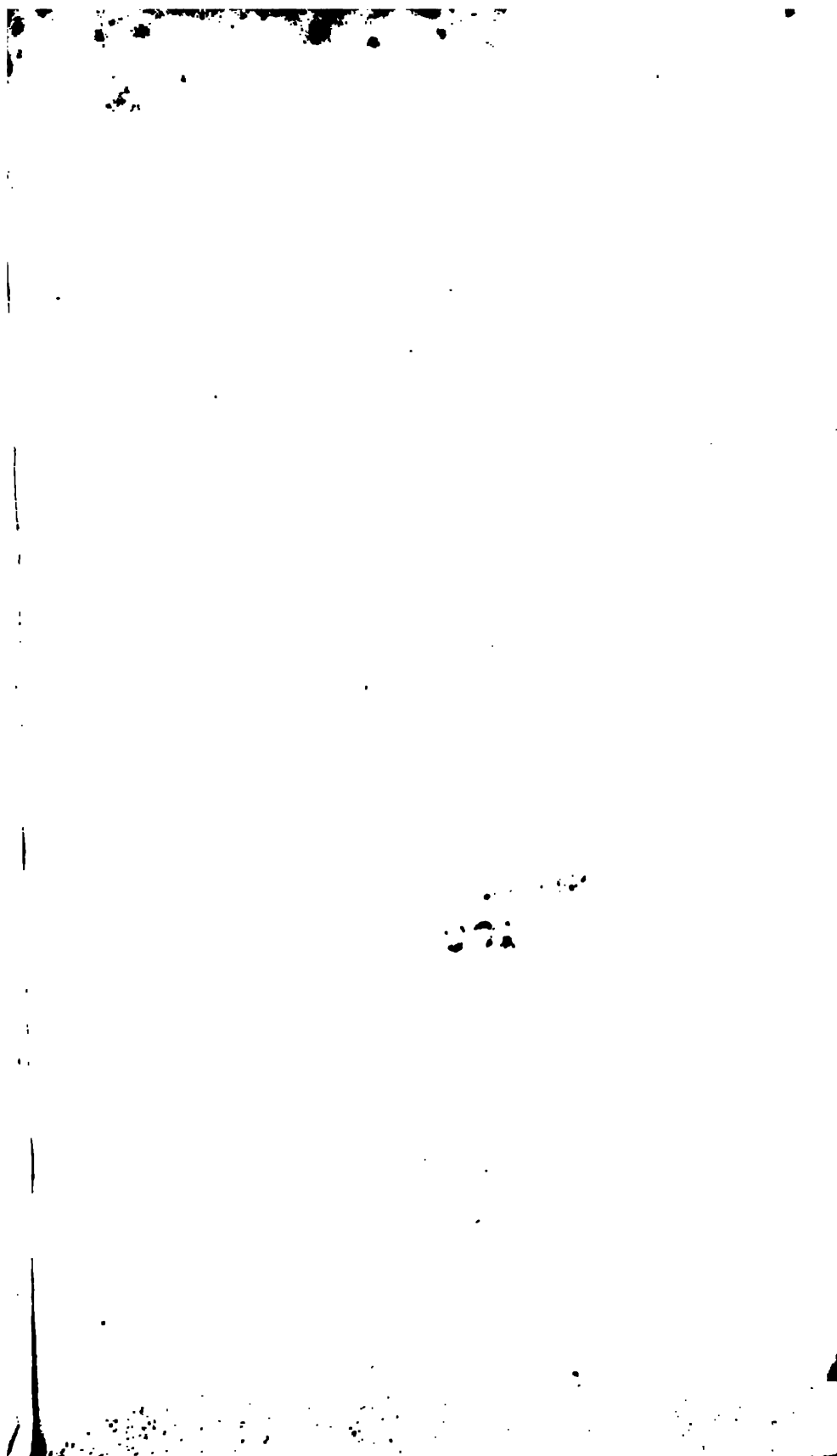


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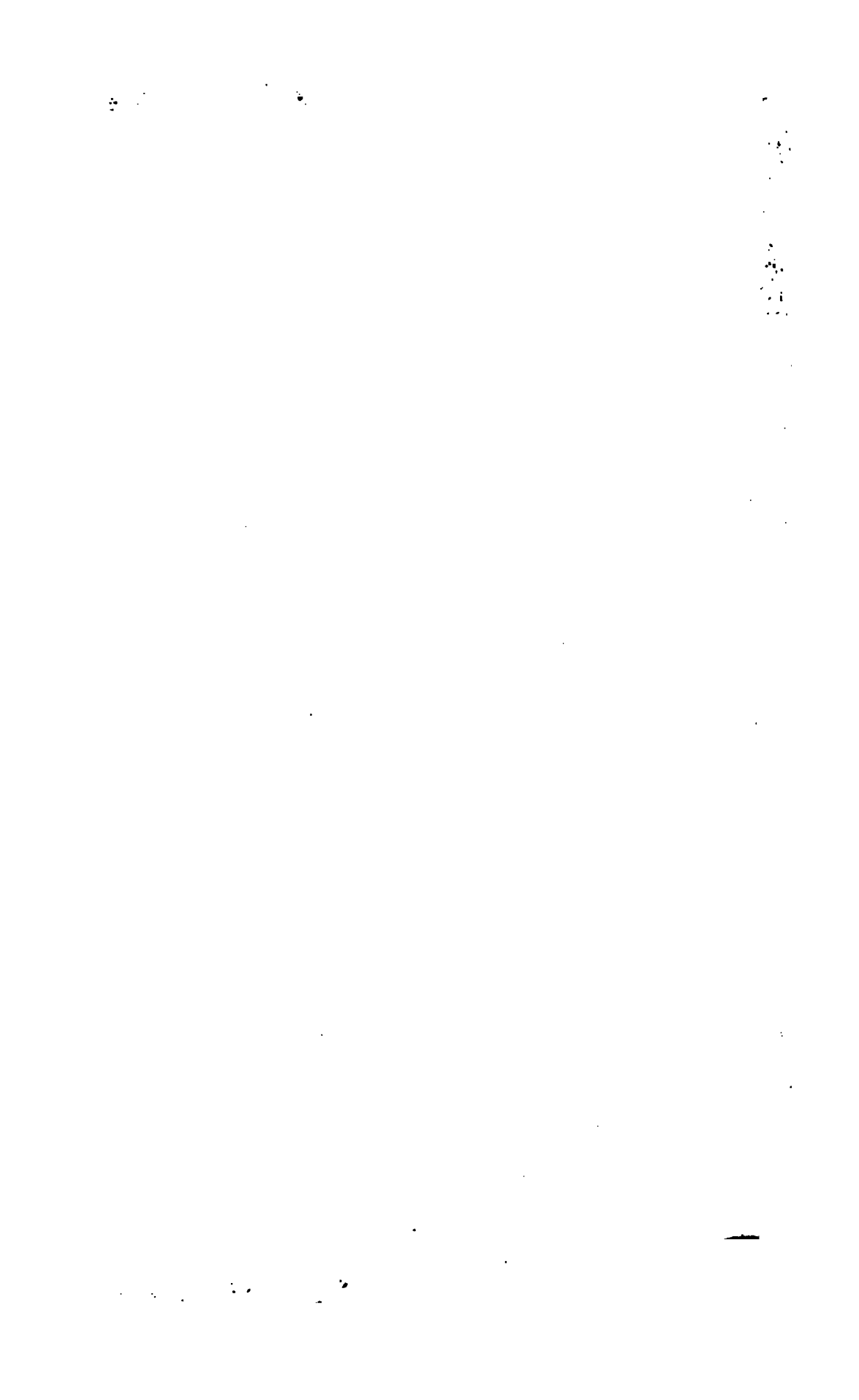
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CASES

ARGUED AND ADJUDGED IN

The Court of King's Bench, AT WESTMINSTER,

*In the 7th, 8th, 9th, and 10th Years of the Reign of
His late MAJESTY,*

KING GEORGE THE SECOND;

DURING WHICH TIME THE LATE

LORD CHIEF JUSTICE HARDWICKE

PRESIDED, IN THAT COURT.

TO WHICH ARE ADDED,

• SOME DETERMINATIONS

OF THE LATE LORD CHIEF JUSTICE LEE;

AND ALSO

TWO EQUITY CASES

BY LORD CHANCELLOR HARDWICKE.

THE SECOND EDITION, CORRECTED;

WITH NOTES AND REFERENCES;

AND

A DIGESTED TABLE OF THE PRINCIPAL MATTERS,

BY THOMAS LEE,

OF GRAY'S INN.



LONDON:

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PREFACE

TO

THE PRESENT EDITION.

THIS volume contains many cases no where else reported ; but, associated as they are with the name of Lord Hardwicke, they might, independently of their intrinsic value, justly demand a place in the library of the British lawyer.

It may not be inexpedient briefly to mention what has been done on the occasion of the present republication.

1st. The text, remarkably faulty in the former, is corrected in the present edition.

2d. Marginal reductions of the points decided are now first prefixed to all the cases.

3d. The original table of the cases reported and cited is, in respect of those reported, corrected, and, in respect of those cited, corrected and much enlarged.

4th. A digested table of the principal matters is now first added.

5th. The paging of the original edition is preserved.

Lastly. To almost every case is subjoined, for the usual purpose of elucidation, a note or notes, with references. These the editor has endeavoured should be found pertinent, perspicuous, and concise.

THOMAS LEE.

INNER TEMPLE LANE,
Michaelmas Term, 1815.

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CORRIGENDA.

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59. Line 8—read, "the prior of Leeds' case."
119. Placitum—read, "Declaration in replevin for taking."
141. Placitum—read, "the first day of the previous term, and the day of the subsequent term wherein the *latitat*."
170. Placitum—read, "by motion in court."
185. Placitum—read, "for a legacy given by."
207. First placitum—read, "the defendant cannot be declared against by the bye, as where the bail is filed by him."
254. For [*255] margin, read [*254].
282. Second placitum—read, "13 & 14 Car. II."
301. Placitum—read, "18 Eliz. c. 3; and which confers no power to convict or acquit, therefore an order."
303. First placitum—read, "on the ground of variance; where."
322. Second placitum—read "non-payment by maker."

❧ *The words between brackets in the text are added by the present editor.*

The notes now first subjoined to each case are distinguished by figures.

MICHAELMAS TERM,

7 Geo. II. 1733. B. R.

PHILIP Lord HARDWICKE, Lord Chief Justice.

Sir FRANCIS PAGE, Knt.

Sir EDMUND PROBYN, Knt.

WILLIAM LEE, Esq.

No Attorney-General.

CHARLES TALBOT, Esq. Solicitor-General.

} Justices.

THOMAS and BISHOP.

2 Barnard. B. R. 320, 335. 3 Bac. Abr. 563. 2 Stra. 955. 2 Kel. 136, pl. 116.
Ridgw. 9. S. C. Mol. b, 2. chap. 10. sect. 15.

A BILL of exchange was drawn in this manner: "At 30 days sight pay to *John Somerville*, or order, £200, and place the same to the account of the *York Buildings Company*, value received, by your's *Charles Mildmay*." Directed "To Mr. *Humphrey Bishop*, cashier of the *York Buildings Company* in *Winchester-street*," and was accepted by *Bishop* in this manner: "Accepted *H. Bishop*, 13th June, 1732." This Bill was indorsed to the plaintiff, who brought an action thereupon against *Bishop* the acceptor. At the trial, which was the sittings after last term before Mr. Justice *Page*, a letter of advice was proved, which was directed "To the Governor and Company of the *York Buildings*," wherein notice was taken of this, among others, in the following words: "*John Somerville* 30 days sight £200." But according to the Judge's direction the jury found for the plaintiff. And now

On a bill of exchange describing the drawee as a servant or agent, a general acceptance will bind him personally.

Kettleby moves for a new trial, and urges that defendant in his own right is not liable for this £200, but only the company: that this is the case of the cashier of the Bank, who never accepts bills otherwise than this is, and that the acceptance by the servants of *bankers is always so, and binds their masters, though it be not specified to be on their account.

Strange with him. That it ought to be left to the jury to see if he did it for himself or the company: observes that this is not only
B drawn

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drawn on a servant of the company, but by a servant of the company likewise. Admits that if it had been directed to *Bishop* without further addition, such a general acceptance as he has made would bind him only.

Serjeant *Darnel pro quer.* That the leaving it in such a manner to a jury would be throwing things into the utmost uncertainty. He ought to be charged according to his acceptance. If a bill be drawn on *John a Stiles* or *John a Nokes*, any one may accept it, and become charged thereby. The act † about inland bills does indeed direct, that where a servant has used to accept, his acceptance shall bind; but how must it bind? why according to the acceptance, and no otherwise. Cannot a servant accept for himself? Yes sure; an acceptance is a contract, and a personal contract too.

Strange, in reply: Allows that a stranger may accept a bill, but then it must be declared on the face of the bill, that he does it for the honour of the drawer.

Yorke, C. J. A bill of exchange is a contract of a very particular nature, depending on the custom of merchants, and must be in writing; the drawer contracts that he will pay if the drawee does not, and so does the acceptor, and so do the indorsers. There may be cases where a writing may have all the forms of a bill of exchange, and yet not be so; but then it is where the money is made payable out of a particular fund, as where the cases *Josselyn and L'Acier*, Trin. 12 Ann. 10 Mod. 294, 316. *Fortesc. Rep.* 281. *Stra.* 24, 219. 2 *Stra.* 762. 2 *Ld. Raym.* 1362, 1481, 1482 and *Jenny and Herle*, Pasch. 10 Ann. in B. R. 8 Mod. 266 *Stra.* 591. 2 *Ld. Raym.* 1361, and if this were within the reason of those cases, I should not be for charging the defendant but as a servant? but this case is a plain bill of exchange; the words, "place it to account of the *York Buildings Company*," and not to the account of the drawer, is an uncommon direction, and shew that it is a bill drawn in favour of the company, but they do not alter the bill with respect to the indorsee; it is the same to him as if they were not there; and then this general acceptance of the defendant is a contract to pay *tenorem billæ*. But then does the letter of advice vary the case? No; not with respect to the indorsee, for that is always a private transaction, and the person to whom the bill is payable is never consensant of it; but even that letter is in very general terms; you say it was proved *at the trial that the Governor and Company did direct the defendant to accept this bill, but are we to take notice of a transaction that passed between the drawee and a stranger? No. If any other evidence were to be allowed to be given to a jury but what arises on the face of the note, it must have very bad consequences with regard to trade, therefore we can take notice of nothing but what appears on the face of the bill. There is a case of *Evans and Cramlington*, reported in 2 *Ventr.* 307. *Carth.* 5. *Show. Rep.* 4. 2 *Show. Rep.*

[*3]

† Stat. 9 & 10 Will. III. c. 17.

Rep. 509, *pl.* 473. *Skin.* 264, where more appeared on the face of the bill in favour of the defendant than does here, and yet judgment was for the plaintiff. The circumstances here, are equitable circumstances between the Company and *Bishop* (1); I do not apprehend that in this case, the present plaintiff can charge the company.

Probyn, J. No doubt but a general acceptance by a banker's servant of a bill drawn on his master will charge the banker only, but here the bill is drawn on the servant.

Lee, J. In considering bills of exchange we should not allow a liberty of going into extrinsic circumstances; for the action brought upon them is not an *indebitatus assumpsit*, but an action brought specially upon the custom, which custom arises from the terms of the bill, and the acceptance is an acceptance according to the tenor of the bill, so that the defendant here has accepted it as the bill imports, that is, as a direction to him to pay so much money.

Page, J. When an action is brought by an indorsee, if we were to allow evidence to be given *dehors* the note, there would be an end of bills of exchange; for if the bill itself is not to be an evidence of the contract to him, how should he know what is?

Cur' would not grant a new trial (2).

(1) For, it seems, that unless the agent specify the character in which he acts for a principal, the principal will in general be bound. 2 *East.* 142, and the authorities there cited. 1 *East.* 434, S. C. 3 *Esp. R.* 266. *Com. Dig.* Attorney, C. 14. *Beaves*, 83-7. *Chitt.* B. E. 40. *Poth.* *pl.* 118. 5 *East.* 148. 1 B. & P. 368. 1 T. R. 181. *Bar. Bay.* 76. *Chitt.* B. E. 40.

(2) This decision has been frequently recognized, and it thence appears, that however a drawee may upon the face of the bill of exchange be described by the drawer as acting for another, yet that such description will not, if the

acceptance itself be general, raise a legal presumption that the acceptance was other than personal; and, therefore, to charge his principal, and also to avoid personal responsibility, it is incumbent upon him to specify in the note, or other attestation of his acceptance, the character in which he accepts. But the general position seems qualified by later decisions; for an agent contracting on the behalf of government is not personally bound, although he do not specify the character in which he contracts. See 1 T. R. 172, 674. 1 *East. R.* 135, 579. *Chitty*, B. Ex. 40.

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and
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HOLMES and GORDON.

WILLES moves on the statute of 7 *Ann. c.* 12, to discharge the execution against the defendant, as being a servant to *Baron Hopman*, resident from the *Duke of Mecklenburgh*; the defendant was a menial and domestic servant to the Baron, and continued in his service to the time of the arrest; says, a certificate of his being a servant to the Baron was registered in the secretary's office, and also in the sheriff's office, according to the statute; the arrest was by *Chase* and *Brown*, sheriff's bailiffs.

Upon an application under stat. 7 *Ann. c.* 12, to be discharged from custody, the defendant being a domestic servant of an ambassador, the affidavit must specify the service.

B 2

Probyn,

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Probyn, J. There is no mention of what capacity he served in; *Goring* swears he was an officiating servant, but it is usual to set out what office he serves in; the affidavit is very loose; but

Cur' Rule to shew cause.

Willes moves to make the rule absolute, and insists that the execution ought to be discharged.

Strange e cont'. The court would not break into the privilege of ambassadors if fraud did not appear; the affidavit does not set out what office the defendant serves in; he must be entitled to the privilege under the statute, being a menial servant, but admits it is not necessary to shew he lies in the house; thinks the affidavit is dressed up to give a colour to the affair. The defendant is a solicitor on record in Chancery; the plaintiff employed him to put a note of £200 in suit, which he received, and it is for this money that this action is brought.

Willes. The question is, whether the defendant had made himself such a person as the act describes; if he has, he is entitled *ex debito justitiæ* to ask to be discharged; the act indeed requires he should be a domestic servant, but it is admitted he is not required to lie in the house.

The certificate mentions a hiring for a year, which is the strongest hiring, for it is sufficient to gain a settlement; his being a solicitor is of no weight, for it is not inconsistent with his being a servant to a foreign minister.

Abney with him, cites *Ward* and *Purcel*, *Michaelmas 2 Geo. II.* †, *Purcel* had protection under the *Venetian* ambassador notwithstanding he was not resident with him.

In the case of *Widmore* and *Aloares* ‡, the defendant was protected as *valet de chambre*.

[*5]

*In *Evans* and *Hicks*, *Pasch. 1 Geo. II.* § the defendant was protected as a *Latin* secretary, and it was said that residence was not necessary if he was not within the exception of the statute, as subject to a statute of bankruptcy; thinks the present case as strong as any of these, and that the defendant is well entitled to this privilege.

Lord Hardwicke, C. J. It is undoubtedly the duty of the court to take care of ambassador's privileges, and so likewise they should of the privileges of his Majesty's subjects, and that they should not be deprived of the benefit of the laws by any colour of privilege; domestic servants, as in this case, is not sufficient without shewing the nature of the service, and it is not sworn that he is of any particular descriptive office.

As to the lying at the house, it can be of no weight, for lying there half an hour would save the oath; and as to his going about the Baron's business, it might be an occasional service, but that cannot determine him to be a domestic servant; thinks his being a solicitor

† *Barnard. B. R.* 79, 80.

§ 2 *Lord Raym.* 1524.

‡ 2 *Str.* 796, 797. *Fitzgib.* 300, pl. 12. *S. C.*

a solicitor is no determinate reason, but it may make us require the strictest proof, I am therefore of opinion the rule should be discharged.

Page, J. Of the same opinion; and so *Probyn, J.*, and that it does not appear a sufficient hiring within the act.

Lee, J. Since the opinion of the court is given it signifies nothing to say any thing further; but I should doubt on the words of the affidavit, which refers to the letter of the ambassador; the letter would be sufficient to charge the minister with the wages, and the affidavit swears to acts that might be the proper business of a minister's servant, as transcribing letters relating to the public service; I should therefore think there was sufficient evidence of the service.

Lord Hardwicke, C. J. Thinks any servant at large might as well claim the privilege; he might at this rate protect 500 servants.

Cur'. Rule discharged(1).

(1) This case is cited *arguendo*, 3 Burr. 1 Taunt. 106. 9 East. R. 447. *Flint v.* 1480. For the history of the statute, *De Loyant, Mich. Geo. III.* 1 Tid. 191, see *id.* 1478. See also 1 Burr. 401. 4 ed. 1812. 3 Campb. 47. Burr. 2015. 3 Wils. 33. 3 T. R. 79.

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and
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HORTON and KILMORE(2).

2 Kel. 157, pl. 129. S. C.

THE court now proceeded to give judgment in this case.

Lord Hardwicke, C. J. There are several cases that depend upon this judgment, being all upon the same point. There was a verdict and judgment for the plaintiff in the court of Common Pleas, and error brought thereon returnable in this court, and the error assigned is that the proceedings are in *Latin*, and by the stat. 5 Geo. II. c. 27, all judicial proceedings are directed to be in the *English* tongue, where the cause of action should not amount to £10 or upwards in any superior court, or to 40s. or upwards in any inferior court. Now in the present case the damages in the declaration are £40, and the verdict is only for one shilling. And upon this the question is, what ought to be the measure of the damages. On one side it is insisted, that the finding of the jury ought to be; and on the other, that the sum laid in the count should.

We have considered of this matter, and are all of opinion that the cause of action ought to be taken from the sum laid in the count, because in actions that sound in damages the plaintiff cannot see what damages may be given; the stat. 5 Geo. II. recites the

What proceedings are to be in *English*.

Damages laid in the declaration considered as the cause of action.

[*6]

(2) This case occurred upon the construction of the statute 5 Geo. II. c. 27, but see the statute, 6 Geo. II. c. 14. s. 5.

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the stat. of 12 Geo. II. c. 29, and is connected with it; and in the clause relating to special writs in sect. 5. of stat. 5 Geo. II. the plaintiff's demand is plainly understood to be the cause of action, for otherwise it would make the attorney an offender.

So in pleading the statute of limitations† in executory promises the cause of action is taken to be the plaintiff's demand. And

So by the statute of *Gloucester* (1); the cause of action is taken to be the plaintiff's demand; where it is enacted, that none shall have writs of trespass before justices, unless he swears by his faith his plaint is true, and that the goods taken away were worth 40 s. at least.

The reason why these affidavits are forborne is given in 2 *Inst.* 311, to be, because of the inconvenience; and the defendant, says the book, is left to take such exceptions as the common law gave him.

The stat. of *Gloucester* is likewise to direct the jurisdiction of inferior courts; and at fo. 312 of 2 *Inst.* it is said the stat. hath received this construction, that in the county courts the cause of action or demand must appear in the plaintiff's count to be under 40 s. for it is not sufficient that it appears by verdict that it is so for example (says the book) if the plaintiff's count be in trespass debt, detainue, covenant, &c. to the damage of 40 s. and the jury find the damages under 40 s. yet the plaintiff shall have no judgment albeit in truth the cause belonged to the inferior courts; *Margaret Coke's case*, 19 Hen. VIII. abridged by Bro. tit. *Jurisdiction*, pl. 40, was fishing in her fishery to her damage of 41 s. there was a verdict for the *plaintiff with 8 d. damages, and in arrest of judgment it was objected that the court could not hold plea of less than 40 s. but over-ruled, and held that if a man lay his damages in the count to be 40 s. or upwards, and has a verdict but for 12 d. yet he shall recover. If in an action in a court baron for 39 s. and the jury gives 40 s. or upwards, the plaintiff may omit the overplus; would not be thought to lay this down as a rule in all cases, but for another reason we are more clear in this case; stat. 6 Geo. II. c. 6, to explain the act of 12 Geo. I. to prevent frivolous arrests, recites this act of 5 Geo. II. and extends it to the judicial proceedings in *Wales*, and in that provision the cause of action is plainly intended the sum declared for.

This we look upon as a parliamentary construction, and as the legislature have expounded their meaning, we think ourselves bound, and therefore that judgment should be for the plaintiff; and so likewise in the other two cases, viz. *Holloway* and *King* (2), and *Thurston* and *Harris*. There are two cases that are contrary to these, viz. *Osborne* and *Mayo* (3), and *Charlton* and *Totthill*.

In these cases the proceedings are in *English*, and the damages laid in the declaration are £25, and the verdict is for £9. 15s. but because

† 21 Jac. c. 16.

(1) 6 Edw. I. c. 2.
(2) 2 Barnard. 336.

(3) Probably *Osborne v. Oyle*, 2 Barnard. 268, 327.

because we take the sum demanded in the count to be the cause of action, we think this not within the statute; and then, as the statute of *Edw. III.* is express, that all judicial proceedings shall be in *Latin*, we think the judgment in these cases should be reversed. It is indeed incumbent on the court, as far as they can, to aid the remedy of the plaintiff so as for him to keep his judgment. But we think ourselves bound by the statute of *Edw. III.* and cannot find that proceedings in *English* have ever been aided by the statutes of jeofails. Mentions the case of *Gristling and Wood, Cro. Eliz. 85. pl. 4.* Error for that in an action in an inferior court the declaration was in *English*, whereas by the statute of 36 *Edw. III. c. 15*, all entries are to be in *Latin*; and although it was said the custom there was so used, yet this cannot be good against the statute, and the judgment was reversed; and *Evans* said that divers indictments had been discharged for this cause. For these reasons we think that the judgment in these cases should be reversed, and that in the other cases the judgment should be affirmed.

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HORTON
and
KILMORE.

*THE KING and WHITE.

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ON a motion for an information against the defendant in the nature of a *quo warranto*, to shew by what authority he exercises the office of burgess of the borough of *Caln*; the question was, whether being an infant under the age of 21 years at the time of his election, he was capable of exercising his office. Rule to shew cause was made, and now

Serjeant *Chapple* comes to shew cause. Knows no particular law that a man must be of full age, or of any definitive age to serve the office of burgess of a corporation. Before the statute of King *William (1)* many persons under 21 in parliament.

Abney e cont' says, that in *Hil. term, 3 Geo. II.* an information of this nature was granted against the Duke of *Bedford*; but *cur'*. The rule in that case was never made absolute. Mentions 5 *Co. 27. a. b. Russel's case*, where it is said, as the King shall not void leases or grants in respect of the infancy of his natural capacity, so the mayor, bailiff, or head of any other corporation, shall not avoid any of their deeds or grants for the infancy of their natural capacity, because they do them in another right and capacity.

Co. Lit. 3. b. That an infant is not capable of the office of stewardship of the court of a manor either in possession or reversion.

Fortescue with Serjeant *Chapple*. If an infant might be a member of parliament, surely he may be a burgess.

Lord *Hardwicke, C. J.* Does not know that was ever settled.

Fortescue. It is plain from the case of *Young and Fowler, Cro. Car. 557.* That an infant may be a mayor of a corporation, then
a fortiori

Although infancy in the mayor, bailiff, or other head of a corporation shall not avoid the deeds or grants of a corporation, because he acts in his corporate, and not in his natural capacity, yet this does not affect the question with respect to members of the corporation.

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a fortiori he may be a burgess. By the statute of 5 Eliz. an infant may bind himself apprentice, and when he has served surely is entitled to exercise his trade, though he may not be at the age of 21 years. An infant may present to a church.

Strange on the same side. The defendant was elected the 4th of April, came of age the 20th, was sworn the 26th, and acted before he was of age. Makes a distinction between an infant's exercising a judicial office and a ministerial office. There are several ages that give different capacities to infants, as to being sent in marriage, when to be bound by contract, when to take oaths, allegiance, &c. Has no case in point; but

By March, 40, an infant may be mayor, and *a fortiori* he may be a burgess.

Draper with them. The grant of a stewardship to an infant in reversion is certainly good, if it does not happen till he comes of age; a man may be a burgess by descent; an infant may be a burgess at the leet.

Cur' thinks if an infant is not fit to manage for himself, it is improper to be a mayor for the public; but as it is a matter of law not settled, the rule must be made absolute to determine it.

(1) See 5 Co. pl. 2. 27. This is said to be the first case reported upon the subject. But from the principles upon which the case of *Rex v. Carter*, 1 Cowp. 220, appears to have been decided, it should seem, that where neither the provisions of the charter nor the election of the corporation expressly an infant into corporate office, he is incapable of being elected. See also *Left* 516.

LORD SUFFOLK'S CASE.

2 Kel. 156, pl. 128. S. C.

An executor or administrator may renounce without exhibiting any inventory.

THERE was a rule in this case to shew cause why a man should not go to the prerogative court of Canterbury to grant administration of the late Earl of Suffolk, to the present Earl his son. And now

Dr. Isham comes to shew cause. The Lord Suffolk died testate, and left the Lady Suffolk his widow, and a son; she renounced the administration by proxy, which was admitted as by law was admissible; but a caveat was entered by the tutors of the late Earl, that no administration should pass without their knowledge, and on the resignation of the Countess, and nomination of the now Earl for administration, the caveat was withdrawn and on the prayer of creditors it was ordered that the Countess should exhibit an inventory, or declare on oath that no effectual administration of the late Earl came to her hands; that if she would do this, administration should be granted to the present Earl. Insists the

ecclastical court was proper in refusing to grant administration till this was done, for the constant course of renouncing is upon oath that the person renouncing doth not intend to intermeddle with the intestate's effects, which cannot well be done *in scriptis*, and is seldom admitted but when the person is in another country.

Lord *Hardwicke*, C. J. Asks if there is no case in the ecclesiastical court, where a renunciation is taken without an inventory.

Dr. *Isham*. The constant practice is to have it where required, for the court have the party under their direction.

**Marsh* with them. The ordinary had originally power at his discretion to take care of every intestate's goods till the statutes were made to direct him to grant administration; insists that from the reason of the thing the practice of the ecclesiastical court in this case ought to be allowed, for there may be collusion with the widow.

Fortescue e cont'. We move on the authority of the stat. 21 Hen. VIII. c. 5.

Lord *Hardwicke*, C. J. Thinks the *mandamus* ought to go; the statute is express, and the creditors have no right to stay the administration, especially if fit security is offered and that does not appear to be excepted to.

As to the practice it seems pretty extraordinary; for as the exhibiting an inventory on the resignation is not compulsory, if she should persist to refuse, there might be no administration at all; besides, no remedy could be taken on such an inventory but by the administrator, and that might as well be done in law or in equity, which will follow assets let them come into whose hands they will. The practice may be returned, and then it may come properly in question, but as it appears at present it seems to me to be unreasonable.

Page, J. Of the same opinion; and that there can be no good reason for supporting the practice, for if she refuses, an administration may never be granted.

Probyn, J. Of the same opinion; and so

(*See* mentioning the case of Lord *Londonderry* †.)

Cur' Made rule absolute.

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Lord *Suffolk's*
Case.

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† 2 *Stra.* 857. *Barpard.* B. R. 280. *Andr.* 366.

HILARY TERM,

7 Geo. II. 1733. B. R.

PHILIP Lord HARDWICKE, Lord Chief Justice.

Sir FRANCIS PAGE, Knt.

Sir EDMUND PROBYN, Knt. } Justices.

WILLIAM LEE, Esq.

JOHN WILLES, Esq. Attorney-general.

DUDLEY RYDER, Esq. Solicitor-general.

CLUES and BATHURST.

2 Stra. 960. S. C.

The sentence of an ecclesiastical court in matrimonial causes is evidence against third persons. See *Mendez v. Villa Real*, 18, post.

TRIED at the sittings at *Westminster* after this term. The plaintiff brought an action on the case against the defendant for seducing his wife, and living in adultery with her.

A sentence given in the consistory court of *London* was produced in evidence, wherein it was adjudged on a suit for jactitation of marriage, that *Margaret Golden*, whom the plaintiff now sets forth to be his wife, was never married to him. The words of the sentence were, *as far as appears to the court, they were not married.*

Dr. Lee, from the commons, for the defendant. That this is the form of all sentences on a jactitation of marriage, where it is adjudged that it is no marriage; and as it is a negative sentence no other words can be used. It is a sentence given in a principal cause, the point in issue being marriage or no marriage; and likewise this court is obliged to take notice of it, and are bound by it. 4 *Coke*, 29, *Bunting's case*. The case of *Millisent and Millisent*, 1718, a woman pretended to be *Millisent's* wife, whereupon he sued her for jactitation of marriage, and it was adjudged to be no marriage: the woman afterwards in the court of Delegates pretended to be *Millisent's* widow, and offered to prove her marriage, but the Common Law Judges, that were in that commission, were

of opinion that she could not be admitted to prove it, since there remained in force a sentence in bar against her.

Indeed in the case now before the court there is an appeal entered, but that is merely matter of form, and always done by cautious proctors to save to their clients the time of appealing.

The counsel for the plaintiff replied, that this sentence was given after issue was joined in this action in the Common Law courts, and the matter ready for trial. That the sentence was in a suit only for *jactitation of marriage*, and only imposed silence upon the party; that is, that he should no more *talk* of his marriage. That an appeal was entered, which puts the sentence in suspense.

The court was of opinion that it was no objection, that this sentence was given after issue joined at Common Law, since it was not the act of the party to put an end to the suit at the Common Law, but a proper declaration and determination of a court before whom the matter was cognizable.

Where it was incidentally judged that the parties were not married, and upon that administration was denied, the court declared their opinion, that it could not be given in evidence in the courts of Common Law; but where sentence is given in a principal cause it is otherwise.

That what the plaintiff calls an appeal, and was read in court, was only a protocol of an appeal; and all that it could shew was merely an intention to appeal, and not the act of appealing itself, the instrument not being full.

That though this was a suit for *jactitation of marriage*, that was not a suit for words, but in order to try the right of that marriage, and is the only suit by which the right can be tried.

The plaintiff was nonsuited (1).

(1) See 1 Salk. 433. Carth. 225; also *Kenn's case*, 7 Co. 41. *Da Costa v. Villa Real*, 2 Str. 961, and note 1, *Nolan's edit.* *Duchess of Kingston's case*, Amb. 756. But where the sentence mentioned in this case was offered as *conclusive* evidence against the charge of bigamy, the House of Lords held it was not so; first, because the King was no party to the first suit; nor could become so; and secondly, because the ecclesiastical court had no judicial cognizance of crimes. 11 St. Tr. 261. But to be conclusive, the matter of it must be determined *ex directo*. See 2 Str. 961, cited above, together

with the note. And in *Prudham v. Phillips*, cited Amb. 762, and several times in the *Duchess of Kingston's case*, it was held, that sentence in the ecclesiastical court annulling a marriage might be avoided by third persons, on account of fraud and collusion in the parties, though the parties themselves were estopped from shewing their own fraud. It may further be observed, that although a stranger is not at liberty to shew, that the court, in pronouncing such sentence, was mistaken, yet that it may be shewn to have been misled. See 2 Fcs. 243; also 11 St. Tr. 262; also *Peak. Ev.* 83.

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HOOKER and HOOKER.

2 Barnard. B. R. 200, 232, 579. 2 Kel. 191, pl. 156. S. C.

Where a remainder in tail or fee comes to or descends on tenant for life, either by his own act, or the operation of law, the two estates are so consolidated, that it should seem the intermediate contingent estates are destroyed; or, if they do open on the contingencies happening, they are suspended till that time, and the wife of the tenant for life, with such contingent remainders, shall have dower.

A QUESTION in dower sent by the court of Chancery for the opinion of this court.

The case was this: *William Hooker* the elder and *ux'*, and *William Hooker* the younger and *ux'*, by their deed dated the 12th of July, 1699, covenanted to levy a fine to the use of the conusees in fee; the fine was levied, and afterwards the conusees by lease and release convey to *Young* and *Goadvoy* for the use of *William Hooker* the elder for life, and to his wife if she survive, then to *William Hooker* the younger for life, (who was the son and heir apparent of *William Hooker* the elder) remainder to his first and other sons in tail, remainder to his daughters in tail, remainder to *Hooker* the elder in fee, with power to *Hooker* the younger to settle on any other wife. *William Hooker* the elder and his wife died without other issue in the life-time of *William Hooker* the younger, whose wife also died. He had two other wives, and the last is the plaintiff, and he being *dead without issue*, the question is, whether this last wife be entitled to dower in these lands?

Serjeant *Bellfield*. The question will depend on what estate *Hooker* the younger had at the death of *Hooker* the elder; for by the deed it is plain he took only an estate for life, but apprehends that the remainder in fee descending and coming to him on the death of *Hooker* the elder, the plaintiff will be plainly entitled to her dower.

Lord *Hardwicke*, C. J. It did not descend to him.

Bellfield, Serj. Thinks it will be the same, for both estates were so consolidated as to make him tenant in fee; but it has been objected that though the estates were consolidated, yet that they might open again to let in the contingent remainders, as was held in *Lewis Bowles's* case in the 11th report(1); and therefore that *Hooker* the younger was in effect but tenant for life, and consequently that the plaintiff his widow can be no way entitled to dower in these lands; but says, the reason of *Lewis Bowles's* case was, because all the claims appeared by the same deed, but here this is a matter entirely *dehors* the deed; besides, as *Hooker* the younger died without issue, there never was any occasion to open the estates, and by his death the contingency is entirely determined, but apprehends the contingent remainder was destroyed on the death of *Hooker* the elder, and that the fee falling on the estate for life, could not but drown the estate for life so as to stop the contingent remainders, which, as they could not take effect on the death of *Hooker* the elder, never should afterwards. Cites *Vent.* 306, *Kent* and *Harpool*. *Tho. Jones*, 76, 77.

The case is not truly stated, but the point adjudged proves the same thing; it was error of a judgment out of the King's Bench in *Ireland*;

Ireland; *Harpool* being seised in fee conveyed to the use of himself for life, remainder to his eldest son for life, remainder to the first and other sons of that son in tail, remainder to himself in fee; the father died before the first son was born; and whether the descent of the reversion in fee to the son did prevent the contingent remainder, was the question. The estate by some act of the father was forfeited to the crown, and the first son claimed under the intail; but it was held he had no right, and that they need not consider the statute from whence the forfeiture arose; for it was clear that the contingent remainder was destroyed by the consolidation of the estate for life, and the remainder in fee: it was argued that it was not because the inheritance came to the son by act of law; and the opinion in *Cordull's* case in *Cro. Eliz.* 315, *pl.* 10, was cited, but *Twisden* took it sorely, and said it was shaking the foundation of all estates.

Insists on this as a case in point, but admitting there might be an opening thinks the fee was so far executed as to entitle the wife to dower; estates in dower are very much favoured in law; the wife of a man seised of a defeasible or base fee shall be endowed till the estate is defeated; so is *Seymour's* case in the 10th report (1); if a disseisor dies seised, the widow shall be endowed as long as the estate continues.

Fazakerley e cont'. The question will be, whether the husband had such an estate in these lands as would in all events entitle the wife to dower; it cannot be controverted but the father in this case has made his son a purchaser, and that a man may make his heirs purchasers if he parts with the whole estate. Cites *Mitton* and *Twisford* (2).

Apprehends the present case very different from the case of *Kent* and *Harpool*, *Vent.* 306, because there the fee was vested in the grandfather, and therefore descended to the tenant for life as his heir, and so merged that estate; but this case is not so.

In *Wiscot's* case, 2 *Co.* 60, the distinction is taken where the fee and the estate for life are limited by one and the same conveyance, and where they come in by different titles; as if a man makes his estate to three and to the heirs of one of them, there one of them hath the fee, yet the jointure doth continue; for all is but one entire estate created at one time; this plainly shews that an estate for life is not to be merged in a remainder in fee, if the different titles arise from the same deed as they do in the present case.

In *Plunket* and *Holmes*, *T. Raym.* 30, it is said, though the fee descends it shall not confound the estate for life, but there shall be a *hiatus* to let in the contingency when it happens; so was *Lewis Bowles's* case, where, notwithstanding the estates were consolidated, yet it was held that they should open to let in the contingent remainders.

If the husband in this case had left a son, nay, if the son had been

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(1) Page 95.

(2) Not elsewhere mentioned.

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been born after his death, it must have defeated the estate in dower; or if the child had died, should the estate have been revived: as to the case of the disseisor, his estate is to be considered in law as a rightful estate, at least till the contrary is made appear.

It might as well be said that the wife of an heir to whom an executory devise is made should be endowed.

Lord *Hardwicke*, C. J. Suppose the contingency on the executory devise never happened.

Fazakerley. If such a contingent limitation should entitle persons in dower, or by the curtesy, it would let in the greatest confusion to estates.

In the case of *Boothby* and *Vernon*† which was in Chancery, Mr. *Vernon* devised to his sister for life, who was his heir at law, and to the heirs of her body, but if she had none, then remainder over; now there the estate descended to her till the contingency, for there was no one else could take, and yet they would not let the husband be tenant by the curtesy.

By 1 *Rol. Abr.* 676, *Let. F.* If *A* seised in fee of lands covenants to stand seised thereof to the use of himself and his heirs till *C* his middle son takes a wife, and after to the use of *C* and his heirs; *A* dies, by which it descends to *B* the elder son of *A* who has a wife and dies, and after *C* takes a wife; it seems the wife of *B* the elder son shall not be endowed of the said estate of her husband, because his estate is ended by an express limitation.

There are cases where it has been held, that if there be a possibility of another estate to take effect, it shall defeat the estate in dower. So is 1 *Rol. Abr.* 677, *pl. 6.*

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*Besides, here is no possibility that the issue of the marriage in this case should take by descent or inheritance, they could only take under the deed by purchase, and then the rule in *Co. Lit.* 1. *a.* may be considered: if a woman taketh a husband seised of such an estate, so as by the possibility it may happen that the wife may have issue by her husband, and that the same issue may by possibility inherit such estate, she shall have her dower, otherwise not.

Lord *Hardwicke*, C. J. asks, why the issue could not take by descent of the reversion.

Fazakerley. If they could, yet of a reversion a wife cannot be endowed; apprehends, therefore, that the estate in the present case is such an estate as a woman cannot be entitled to dower; for the case of *Kent* and *Harpool*, *Vent.* 306, which is urged by Mr. Serjeant *Bellfield* not to be parallel to this case, because the fee there descended upon the estate for life, was in the last argument denied by Mr. Justice *Reeves* to be law: he said it was founded on *Wood* and *Ingersole*, *Cro. Jac.* 260, which in *Fortescue* and *Abbot*, 2 *Lev.* 202, is resolved not to be law; he insisted that the case of *Plunket* and *Holmes* was strong for the defendant, and that so was *Archer's* case, *Cro. Eliz.* 315, directly in point. See the former argument *per tot'.*

Serjeant

Serjeant Bellfield. In reply, urges, that *Fazakerley's* arguments insinuate as if the intent of the parties were to govern; but taking it to be so, it cannot be presumed but that at the time of making the deed it was well known that *William Hooker*, jun. would be heir to his father, and that *eo instante* on the death of the father the estate would be consolidated, allowing *Plunket* and *Holmes*, and *Boothby* and *Vernon*, both to be law, yet apprehends they will not affect or come up to the present case.

If the contingent remainder in this case had not been destroyed by the fee's falling upon the estate for life, admits that the issue must have taken by purchase; but as that estate is defeated, and as a contingent remainder once destroyed can never revive, the issue shall take by inheritance as heirs at law to their father; the rule in *Co. Lit.* will not prevail.

Lord Hardwicke, C. J. The general questions in this case are, 1st. Whether the contingent remainder was destroyed by the reversion in fee falling on the estate for life; and 2dly, Admitting that it was not, and that there might be an opening, whether this possibility would destroy the dower?

*Is inclined to think the remainder is destroyed; the collecting the intent of the parties by any subsequent act *dehors* the conveyance ought not to be taken into consideration, and therefore to say any other matter than what appears upon the face of the conveyance to have been in the contemplation of the parties, cannot be of any weight. *Kent* and *Harpool* (1) was a very strong case.

In *Purefoy* and *Rogers*, 2 *Sand.* 380, the express opinion of *Hale* and the Judges was, that the purchasing the remainder in fee by the tenant for life totally destroyed the contingent remainder, and that it could never be let in again though the particular estate were revived.

But supposing it were not so, and that there was a possibility of the estate's opening in this case to let in the contingent remainder, yet does not think it would defeat the dower.

The distinctions in the law-books are, that where a remainder comes in it shall work no wrong; does not find that any of the books say, that if the estates opened during the tenancy in fee, that the wife would not be endowed; in *Cordall's* case, *Cro. Eliz.* 316; it is said that it was resolved the estate-tail in that case was not executed for the probability of the mesne estate that might interpose, and that therefore as it was always disjoined during the life of the tenant in tail, his wife could not be endowed; but in 2 *Sand.* 336, this case is denied to be law; and has seen a note of a like case in the Common Pleas, where it was likewise denied to be law by *Bridgman*.

But thinks the judgment in *Duncombe* and *Duncombe*, 3 *Lev.* 437, was right, though Mr. Justice *Levinz* seemed even to doubt there. In 50 *Edw.* III. 4, 5, it was held that the wife of a tenant in special tail after possibility, as who had the remainder to him in

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(1) *Vent.* 306. *Tho. Jones*, 76, 77. *S. C.*

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tail general, should be endowed notwithstanding the tenancy in special tail, and thinks therefore that the present case is a proper case for the wife to have her dower; finds the books generally so, and that there are no cases against it but *Cordall's* case, which has several times been denied to be law; and if my brothers are satisfied, I would not put the parties to the expence of a further argument.

Page, J. Here is nothing but a possibility which has never happened, nor can now happen, to distinguish this estate from an estate in fee, therefore thinks the wife plainly entitled to dower.

Probyn, J. The distinctions taken in this case may be allowed, and yet the widow be entitled to dower; besides, it is impossible now the contingencies ever should happen.

**Lee, J.* *Kent* and *Harpool* is to me a very strong case; the words of the book are a vesting *sub modo*, but here there is an actual limitation to the right heirs, which makes the estate vested, and if an absolute vesting there never can be an opening to let in the remainder, but is an utter destruction of it.

Lord *Hardwicke, C. J.* The case of *Boothby* and *Vernon* does not come up to this case, for the wife there was but a bare tenant for life with a possibility to her issue.

Cur' All clear of opinion that the widow in this case is entitled to dower. Judgment for the demandant (1).

(1) See 2 *Sarrd.* 381, 382 c. n. (1), where the learned editor observes, that this case is recognized by Lord *Eldon*, in *Doe v. Scudamore*, 2 *Bos. & Pul.* 294. The way of considering the cases cited and mentioned in the very elaborate

note referred to, seems to the annotator, to remove the doubt, and explain the difficulty drawn by Mr. *Fearne* from them, in his *Essay on Contingent Remainders*. See *Fearne*, *Conts* Rem. 262, 269. 4th edit.

MENDEZ and VILLA REAL.

Da Costa and Villa Real, 2 *Stra.* 961. S. C.

In a suit on a contract of marriage, sentence of a spiritual court on a question whereof it had proper jurisdiction, may be given in evidence under the general issue; and, where given to the principal point, held conclusive.

ON a trial at the sittings in London after Hilary term, 1733-4. Lord *Hardwicke, C. J.*

The plaintiff brought his action on a contract of marriage: the defendant pleaded the general issue, and gave in evidence on the trial a sentence pronounced in the spiritual court on a suit there on the contract, setting forth that it was no contract: after long and solemn arguments both by civilians and common lawyers on each side, his Lordship was opinion (from the foregoing case of *Clues* and *Bathurst* (2), and many others then cited) that this sentence might be

be given in evidence on the general issue; and as this was a sentence obtained in a principal cause, and in a matter whereof the spiritual courts had proper jurisdiction, that it was a sentence conclusive of the court. The counsel for the plaintiff objected, that where the end and intention of the suit in the spiritual court was different from that of the action at Common Law, the sentence ought not to bind; but his Lordship was of a different opinion, since the end and intention can seldom be the same in the ecclesiastical and temporal courts, the one being for a spiritual and the other for a temporal consideration (1).

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(1) 2 *Salk.* 438. See *Hilliard's* case, *post*, 312, mentioned by the Chief Justice, where a distinction is recognized, viz. that a sentence of excommunication in a spiritual court for fornication between the father and mother of a party, where legitimacy was impeached, had been properly refused to be received in evidence. But this recognition turned upon a presumption, that a record of conviction in a criminal case cannot be given in evidence in a civil cause. See *post*, 311, 312, and note there;

EASTER TERM,

7 Geo. II. 1734, B. R.

PHILIP Lord HARDWICKE, Lord Chief Justice.

Sir FRANCIS PAGE, Knt.

Sir EDMUND PROBYN, Knt. } Justices.

WILLIAM LEE, Esq.

JOHN WILLES, Esq. Attorney-general.

DUDLEY RYDER, Esq. Solicitor-general.

DOBSON *versus* DOBSON and Others.

2 Barnard. B. R. 180, 207, 443. S. C.

Damages from the death of the husband till the widow have seisin will be given against tenant in a writ of dower *unde nihil habet*, unless he plead no demand of dower made.

The construction and application of the word *ipse* in the plural number.

A WRIT of dower *unde nihil habet* was brought in the Duc court of Lancaster, and judgment for demandant. A writ seisin was awarded accordingly, and a writ of inquiry, and on the return of it damages were given to the widow to the full value the dower from the death of her husband to the return of the writ of inquiry. Error is brought in B. R. and the following exceptions taken by Mr. Strange on the side of the plaintiff in error.

1. That no damages will lie in this case. 2. That supposing damages will lie, yet not from the time they are awarded. 3. That as damages are given too soon, so they are carried too far.

As to the 1st, Damages are not to be recovered but in a writ of dower *unde nihil habet*, according to Lord Co. Inst. 32 that it does not appear this is such a writ, for the word *unde* is left out.

As to the 2d exception, damages are given *a morte viri*, when they should not have been given but from the time of suing out the writ of dower, since it does not appear there was any demand of dower *in pais*; and Co. Lit. 32 and 33, it is said that the demandant should take care to make demand as soon as possible, lest he lose the value of her dower, and that the heir does no wrong till demand is made.

As to the 3d, damages are carried down to the time of assessment

them by the writ of inquiry, whereas they had a writ of seisin for a year, which, if they delayed to execute, the damage they have received from it must be imputed to their own laches.

Another objection is, that there does not appear to have been any default in the tenants, the entry being *quod ipse exact' non ven'*, in the singular number, whereas there are four tenants, so that it does not appear that above one was summoned, nor can it be ascertained which one that is. Lastly, here is a discontinuance, no day being given to the tenants to appear on the return of the writ of inquiry.

Parker, contra. That they were entitled to the damages given, for it was incumbent on the tenants, would they have excused themselves from damages, to have pleaded *tout temps prist*, as the words of the statute expressly require (1).

As to the omission of the word *unde*, they ought to have brought the original writ before the court by *certiorari*, otherwise the court will not presume it to be so.

2dly, As to carrying damages too far, the natural construction of the words of the statute of *Merton* (2) is, that the widow shall recover damages till she have seisin, 1 *Leon.* 56, and here it appears that seisin is not delivered till after executing the writ of inquiry. *Spiller and Adams, Hill.* 8 *Geo. I.* 8 *Mod.* 25.

As to the next objection, that there is no default, because the default is changed in the entry in the singular number. Cases in dower are entitled to all the favour the court can shew. In the case of *Beach and Chatfield, Easter, 3 Geo. I.* judgment pronounced *Michaelmas* 4th of the same King; a plea ended with *hoc parat' est verificare*, when there were two defendants, and the court said that these words might be understood impersonally; and if the word *ipse* be taken in the plural number to agree with *personæ* understood, it will only make it false *Latin*, which will not vitiate.

Neither is it discontinuance that no day is given to the tenants to appear on the return of the writ of inquiry. *Rast.* 238, *b. pl.* 16. *Coke's Ent.* 181. *Brown's Ent.* 222. *Robinson's Ent.* 293, 251, 254. *Besides, it is aided by stat. 4 *Ann. c.* 16, which, amongst other things, aids judgments whereon writs of inquiry are awarded.

Lord *Hardwicke, C. J.* and *Cur'* over-ruled all the exceptions on the answers given, but that which is that there does not appear to be any default, because the words in the entry are *quod ipse exact' non ven'*, since the words seem naturally to refer to no more than

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(1) *Rast.* 236, *b.* 237, *a.* 1 *Bro. Ent.* 303, and if the demandant shall not have requested her dower, the tenant will be excused from paying mesne profits and damages for the detention of the dower, *Co. Lit.* 32 *b.* But if the demand shall have been made, that fact must be replied, and issue taken thereon, *Harg. Co. Lit.* 33 *a.* note (1). 1 *Lutw.* 717, and therefore the recommendation to demand her dower in the

presence of witnesses as soon after her husband's death as the widow can; mentioned *Co. Lit.* 32 *b.*

(2) 20 *Hen. III. c.* 1. It is there enacted, "that if a widow shall recover her dower of the lands whereof her husband died seised, the tenant shall yield damages, that is to say, the value of the dower from the time of the death of her husband, until the day she shall have judgment to recover seisin."

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than one, and it did not seem that on default of one tenant the court should give judgment against all, therefore as to this exception they ordered it to be argued again.

Afterwards, *Michaelmas* 8 Geo. II. Mr. *Draper*, for the tenants on this exception.

That the entry of the judgment being the act of the court, it cannot be intended that more are summoned than are said to have been summoned; that the word *ipse* having already a good grammatical sense, and not repugnant to any thing in the record, it could not be rejected. *Wyat and Aland, Salk.* 324.

Fenwick, contra. That the word *ipse* should be rejected as surplusage, the sense and diction being better without it. *Comber.* 168, *Fitzgerald and Clanricard.* A woman tenant in a writ of dower appeared by her guardian; the entry of the judgment had these words, *quod ipse non potest dedicere*; and it was the opinion of the court that it might refer to her guardian, and be good.

Lord *Hardwicke*, C. J. In cases of this nature, which wholly turn upon critical construction of words, it is incumbent upon the court to endeavour, if possible, to make them good in order to maintain the right of the party.

These words cannot be amended in this court, but it seems that they might have been in the court below, *Trin.* 2 Geo. II. *Muttit and Denny*, 2 *Str.* 807. *Barnard. B. R.* 53, ejectment against two defendants; the plaintiff declared that *ipsi intravit expulit et amovit*; the court thought it ill, but ordered it to be amended according to the authority of *Cro. Jac.* 306. *Salk.* 48(1).

That it cannot be rejected, for the rule is, that words cannot be rejected unless they make an inconsistency, but if they have a sense as they stand, though it vitiates the thing, they cannot be rejected otherwise according to that rule any thing may be made right that is wrong.

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*The statute for amendment of the law (2) will not help this, for that only aids judgments by confession, *nihil dicit et non sum informatus*, which are after appearance, and writs of inquiry executed thereon, but no judgments by default before appearance.

But at last the court ruled it good by taking the word *ipse* (= there are no diphthongs in court-hand) in the plural number, and supposing it to agree with the word *personæ* understood.

The judgment affirmed (3).

(1) 1 *Roll. Abr.* 205. *Style*, 339. 2 writ of dower unde nihil habet, see *Mod.* 316. *Comb.* 395. 2 *Str.* 843. *Williams's Saund.* 42, m. with the note.

(2) 4 *Ann.* c. 16.

(3) For pleadings and learning in a

See also *Booth, Real Actions*, 166.

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2 Kel. 188, pl. 134. 2 Barnard. B. R. 367, 443, but more full [Str. 969. Ridgw. 55.] S. C.

ON a special verdict in ejectment for the judgment of the court. The state of the case was as follows :

Richard Holden died seised in fee of the lands in question, having one son and three grand-daughters, and after the death of his son without issue, he devised his lands in the following manner, viz. To his grand-daughters Catherine and Elizabeth, to be equally divided between them and the heirs of their bodies respectively, and for default of such issue, to his other grand-daughter Ann; Elizabeth dies without issue.

The question is, whether the moiety of Elizabeth vests in Richard the son of Catherine, the other tenant in common, by way of cross remainder, or remains to Ann?

Lord Hardwicke, C. J. declared it to be the opinion of the whole court, that upon the construction of these words there were no cross remainders, but that upon the death of Elizabeth her moiety went over to Ann.

In order to raise cross remainders, one of these two things are necessary, either that there be express words creating them, or a plain intention appearing in the testator to that purpose in his will. In this case there is no pretence that there are express words, whereon to ground cross remainders, but the defendant would endeavour to raise them by implication.

The words relied on by the defendant are *and for default of such issue*, which they would have understood, and for default of issue of both tenants in common in tail. But no case has been cited where cross remainders have been raised by such words (1), for they may as well be understood distributively as conjunctively, and the court cannot raise cross remainders by implications where words are indifferent one way or the other, that would be to act merely by conjecture (2).

But the case is still much stronger against them; for the words, *and for default of such issue*, are relative to what went before: and had the words been, *and for default of such issue respectively* (3), there would not have been left the least colour of argument for cross remainders; and it is the opinion of the court that it is equally strong as it is now expressed.

One devised his lands to his grand-daughters C and E to be equally divided between them and the heirs of their bodies respectively; and for default of such issue, to his other grand-daughter A. C dies leaving a son. E dies without issue. Held that A and not the son of C by way of cross remainder, took E's moiety.

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(1) 1 Atk. 579. See, however, 2 Coop. 797. 4 T. R. 711. Wright v. Holford, 1 Coop. 312. reported by the name of Wright v. Englefield, Amb. 466, and of Wright v. Lord Cadogan, 6 Bro. P. C. 156. 1 Freem. 483. Dyer, 301, pl. 49. Doe d. Burden v. Burville, both cited Coop. 31, 781. 1 Doug. 53, n. 5 T. R. 427, and it seems now established contra the doctrine here vouched in the principal case by Lord Hardwicke, that these

words have been held to raise cross remainders.

(2) 2 Coop. 777.

(3) The word "respectively," or "several" has been held to prevent the implication of cross remainders, unless the intention to create them be otherwise apparent. 2 Str. 996. 1 Atk. 579. 1 Ves. 102. See also Leach v. Jackson, et al. cor. Lord Apsley, Trin. T. 11 Geo. III. in Chan. M. S. mentioned 2 Str. 970, n.

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This also seems to be the natural intention of the will, as the devisees stand in equal degree from the testator; nor is this fact *de hors* the will, but appears in it, from their being described as his grand-children; that *Ann*, who took nothing at the same time as her sisters took, should take after the death of either of the tenant in common without issue.

In the case of *Holmes and Meynel*, *T. Raym.* 452 (1), principally relied on by the defendant, not only the words but the intention of the testator was different, since the devisees did not stand in equal degree from the testator. The same distinction there is between this and the other cases. 4 *Leo.* 14. *Dyer*, 326.

Judgment for the plaintiff (2).

(1) *Poll.* 425. *Sir T. Jones*, 172. *Skel.* 17. S. C.

(2) It is observed, 1 *Doug.* 52, that the general principle of the cases there mentioned is, that between two, the presumption is in favour of, between more than two against cross remainders; but that by necessary implication they may be raised between more than two, as well as by express words. See 1 *East R.* 229. 2 *East R.* 36. and also 1 *Wms. Saunders*, 185, n. (6).

From a perusal of the modern cases to which a reference is above made, it will be evident, that although the particular judgment in the principal case here reported, remains unimpeached, the position therein laid

down, also *Cro. Jac.* 655, viz. that cross remainders can only be raised by express words, or by necessary implication, is considerably shaken, if not denied. It may be observed, that the new doctrine applies to wills only, and that cross remainders cannot be raised by implication in a deed, 1 *Vent.* 224 other than marriage articles, 1 *Va* 105; *Amb.* 663. But notwithstanding this last case it seems that a settlement is not exempt from the new rule that in a deed cross remainders shall not be raised by implication. Further as to this rule see 1 *East R.* 416, where the general as well as particular question was much discussed. But in a will they may. 2 *East R.* 36.

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. 2 *Barnard.* K. B. 93, 447. 2 *Kel.* 210, pl. 164. *Ridgw.* 33. S. C.

The certificate of the Judge reporting the matter of fact as appearing before him at the trial, is conclusive; nor can any affidavit be received against it; for that would be to try the matter again upon affidavit.

ON a motion for a new trial on an information in the nature of a *quo warranto* against defendant to shew cause by what authority he acted as mayor of "*Liverpool*," for that the verdict was found on the matter of law against the direction of the Judge; the Judge at last ordered the jury to find it specially, but they brought in a general verdict.

Resolved, That the certificate of the Judge reporting the matter of fact as appearing before him at the trial is conclusive, nor can any affidavit be received against it, for that would be to try the matter again upon affidavit (4). Stands over.

Finding contrary to the opinion of the Judge on the point of law, and not finding a special verdict when the court directs it, are sufficient grounds for a new trial; except where the Judge was clearly mistaken in point of law, and also except where it appears upon the record that it is impossible the defendant should have judgment by reason of his bad plea (3).

(3) But the mistake or misdirection of the Judge is a ground for a new trial. 4 *T. R.* 453. (4) See *Bar.* 439. *Bull. N. P.* 387. 2 *Tid.* 88. 4th edit. 481a.

N. B.

N B. It has been a doubt, which divided the twelve Judges in the case of the town of *Shaftsbury*†, whether a new trial may be granted on an information in the nature of a *quo warranto* after a verdict found for the defendant, as this suit partakes both of civil and criminal nature; but it never was doubted but that a new trial might be granted after a verdict for the King.

In the case of *The Queen and the Mayor and Burgesses of Bewdley* (1), it was determined by the opinion of eleven Judges against Mr. Justice *Powell*, that if the jury find a verdict upon a point of law contrary to the direction of the court, or find a general verdict where they are directed to find the matter specially, a new trial may be granted even after a trial at bar. The principal cause came on again, *Trin.* 8 Geo. II. 1734. Mr. Justice *Fortescue*, who tried the cause, certified that the verdict was found against his direction, and that he was dissatisfied with it. There were four issues, the three first were preparatory to the last, and were excuses for the late Mayor's adjournment of the court to a day after the day appointed by the charter, and the jury found that there was no necessity for such adjournment, with which verdict the judge reported himself satisfied. The last issue was, whether or no the defendant was duly elected mayor, and the jury found him not duly elected; and this was the verdict with which the judge was dissatisfied. The point of law was, whether the late mayor had a power to adjourn the election of a new mayor to a day beyond the charter-day.

Serjeant *Eyre*, Mr. *Bootle*, Mr. *Strange*, and others for the prosecutors: that though it is the general rule to grant a new trial on a jury's finding the matter of law against the direction of the judge, yet if it should appear to the court above that the judge had mistaken the law in his direction, and that therefore the jury had found right, the court would not grant a new trial, since the jury could at length find no otherwise; and it would put the parties to the expence of a new trial to no purpose, for should they again be directed in the same manner as before, and find accordingly, the court would grant a new trial for the misdirection of the judge.

And that it would appear in this case by the record before the court that the judge had mistaken the law, and that though his report is conclusive as to matter of fact, the court having no other way to be satisfied of it, yet it is not so as to the matter of law, as that may be gathered in many cases from the record.

That this may be compared to the case of an immaterial verdict for the defendant, wherein [if] it appears that he has made out no title by his plea, or confessed the action, judgment will be given for the plaintiff; as in the case of *The King and Philips of Godmin, Stra.* 394, where, on an information in the nature of a *quo warranto*, there was a verdict for the defendant, and yet judgment for the prosecutors,

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† *King v. Bennett*, *Str.* 101. [Also, 8 *Mod.* 201.]

(1) *P. Will.* 212.

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secutors, because the plea had not traversed the usurpation, VI. 37, pl. *12. It is stated, that if in debt the defendant such matters as shew that in point of law he owes the debt, concludes that he owes nothing, the plaintiff may nevertheless judgment upon the confession; and that though there should be a verdict for the defendant, yet judgment will be given for the plaintiff. 2 Rol. Abr. 99, pl. 1, *Lacy and Reynolds*; and another case in the same book, in an action on the case for words, after a verdict for the defendant judgment for the plaintiff on the confession. 1733, *Jones and Bodinham*; and in the same place *Stapledon v. Yelv.* 169, *Molineux's case*. *Broome and Wood* Trin. 4 Geo. II. Trespass for entering plaintiff's house, and carrying away his goods; the defendant justified for a distress for rent; that the goods were appraised, and the appraisers sworn before the headborough, and the residue of the money returned. Upon issue joined; verdict for the defendant, but judgment for plaintiff because it appeared by the act of parliament that the appraisers should be sworn before the sheriff or constable, whereas it was alleged in the plea that they were sworn before the headborough. *Easter, 4 Ann.* a case in Serj. *Salkeld's* manuscript notes passes for throwing down and carrying away stalls; as to a trespass, but throwing down, the defendant pleads not guilty; throwing down a special justification, in which the defendant admitted both the throwing down and carrying away the stalls. The judge of *Nisi prius* refused to try the cause, because the action confessed; and afterwards on motion in the court above held, that the judge did right.

The following exceptions were taken to the opinion of the judge:

First, That it appears upon the face of the record that the defendant *Poole* was not elected mayor agreeable to the charter, the charter appoints the 18th of *October* for the day of election, whereas the defendant has set forth in his plea that he was elected on the 19th, and that the act 11 *Geo. c. 4*, does not give authority to mayors to adjourn the election at their own will, without reason, to a day when their power is expired; neither does any authority even on an adjournment to proceed upon a poll the first day, but they must begin *de novo*. That it appears from the record that the late mayor, whose power determined the day before, presided at the election when the defendant was elected, whereas the act requires that the next officer should preside, the mayor's power being determined. That the statute directs the election to be begun between the hours of ten in the morning and two in the afternoon, whereas it appears by the defendant's plea that this election began between eight and nine in the morning, and that it appears that the defendant was elected the 19th of *October* and yet he pleads an election for the year next ensuing, when the charter his office expires the 18th of *October* next, which

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within the year; on all which accounts it appears that this cannot be a lawful election, and therefore no new trial should be granted.

But *per* Lord Hardwicke, C. J. A new trial ought to be granted in this case.

In the first place, that the general rule is, that if the judge of *Nisi prius* directs the jury on the point of law, and they think fit obstinately to find a verdict contrary to his direction, that is sufficient ground for granting a new trial: and when the judge upon a doubt of law directs the jury to bring in the matter specially, and they find a general verdict, that also is a sufficient foundation for a new trial.

But to those general rules there are some limitations as clear as the rules themselves; one is, that [if] the judge should direct the jury plainly and certainly wrong in point of law, and the jury should find contrary to his opinion, and it should appear to the superior court, under whose direction all trials at *Nisi prius* are, (*Salk.* 643.) that the judge was undoubtedly mistaken; the court would not grant a new trial, because it would be putting the parties to trouble to no purpose; and if the next judge should direct the jury in like manner, and they find accordingly, there must be a new trial for misdirection.

Another limitation is, that if it appear upon the record before the court that it is impossible that the defendant should have judgment by reason of his bad plea, though the verdict were found for him, the court would not grant a new trial. But then these things must appear very clearly, and it must be where every thing appears upon the record that can possibly arise upon the trial, for if all the matter does not so appear, and the verdict may possibly prejudice the defendant in point of law, the court ought in justice to grant a new trial.

That in the present case it does not appear sufficiently upon the record that the law is against the defendant, nor that his plea is so bad that he could not have a judgment were the verdict found for him.

There are two points, one upon the common law, and the other upon the statute; and had the present case rested wholly on the common law, it seems that no new trial ought to have been granted, *for the law before the 11 *Geo. c. 4*, was taken to be that the mayor's office determined at the end of the year, and therefore it seems that it would have been a void election where the adjournment was made to a day after the expiration of his office, especially where it is done without cause.

But the 11 *Geo. c. 4*, was made to remedy such inconveniences; and on that act it ought to be tried again.

It seems indeed it ought to have been the original intent of that act to enable corporations to go to an entire new election on a subsequent day, where no election had been begun before; but notwithstanding,

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withstanding, as this is a remedial law to prevent inconveniencies arising from new elections of annual officers on the charter-day, if the words of the act are large and general enough to comprehend the continuing of elections begun on the charter-day, but not completed within that time, as the mischief is the same, the court ought to give a liberal construction to them; the act says, that where by any accident or default whatever no election shall be made on the charter-day, they may proceed to an election on another day, &c. Upon this supposing the mayor had done wrong in making a voluntary adjournment, the wrong acts of officers were part of what was intended to be provided against by this act.

Another objection is, that the adjournment was made between the hours of eight and nine, instead of ten and twelve: but this mention of hours in the statute is certainly directory, and not restrictive, and intended to prevent surprize by beginning at inconvenient times; now as to what appears on this record, there is no pretence of surprize in the present case.

Roll's Abr. (1) The case of *Launceston*; that corporation chose their officers eight days after the charter-day, and adjudged good, for that the day was only directory.

The next objection is, that the mayor, whose office had expired the day before, presided at this election, and did that appear on the face of the record, it would be a strong objection in favour of the prosecutor; but it does not, therefore the whole matter not appearing upon the record, it ought to go again to trial, that if the jury should find a special verdict, the facts might come more fully before the court.

As to the objection, that it is pleaded to be an election for the year next ensuing, this may be, as it were, a technical year created by the act of parliament, as in corporations where the charter determines the office on a day after a moveable feast, the officers are nevertheless said to be chosen for a year.

The thing that governs greatly in this determination is, that the point of law is not to be determined by juries; juries have a power by law to determine matters of fact only: and it is of the greatest consequence to the law of *England* and to the subject, that these powers of the judge and jury are kept distinct; that the judge determines the law, and the jury the fact; and if ever they come to be confounded, it will prove the confusion and destruction of the law of *England*.

The verdict given in the present case may prejudice the defendant on a writ of error, since for any thing that can appear to a superior court, the jury might have found their verdict on this, that the defendant had not the majority of votes: so that though the law should be with him, he is yet concluded, as they might have found it upon the fact.

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The court concurring in opinion, a new trial was granted on the common rule of payment of costs (1).

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(1) The point as to whether a new trial may be granted on an information in the nature of a *quo warranto*, after a verdict found for the defendant, seems to have been put at rest by a subsequent decision, viz. 2 T. R. 484; the court saying, that of late years a *quo war-*

ranto information had been considered merely in the nature of a civil proceeding, and that there were several instances since the case in *Strange, [Rex v. Bennett, 1 Str. 101.]* in which a new trial had been granted. See 4 T. R. 753. Also *Co. Litt.* 155 b. n. 5.

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ON a motion to set aside bail given in before a judge, the plaintiff not having notice of the bail, and that the defendant put in bail to the plaintiff's satisfaction.

Resolved, That leaving notice under the party's door is in no case sufficient.

That though notice should not be given to plaintiff of the bail, yet if after the bail is put in he takes notice of it, and makes inquiry after the persons, and declares himself satisfied with them, it is the same thing as if he had notice before (2).

Leaving notice under the party's door, in no case sufficient; yet if the plaintiff [his attorney?] make inquiry after the bail, and declare himself satisfied with them, he waives the want of notice.

(2) Whether the first point here ruled may reasonably be doubted. See *Bur.* be agreeably to the present practice 278. *id.* 411.

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And other Plaintiffs in several Suits against the same Defendant.

Com. Rep. 49, pl. 204. *Fortesc. Rep.* 159, 342. 2 *Barnard. B. R.* 222, [433, 448.] 2 *Str.* 985. [*Cum.* 16. *S. C. Post*, 37.]

THIS question was first argued in *B. R. May* 17, 1734, and again before eleven of the Judges, Mr. Baron *Carter* being absent from that argument, in *Serjeant's Inn, May* 23.

* The state of the case was as follows:

A motion was made in *B. R.* to discharge the defendant *John Pitt* out of custody, because he having been member for *Camelford* in *Cornwall* in the late parliament, was arrested by several writs of *capias* out of the Common Pleas and *latitats* out of *B. R.* within

Members of parliament, after its dissolution, have privilege *redeundo*.

If arrested, a member may be discharged on motion without filing common bail (3).

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(3) But it seems that it is discretionary with the court to grant the rule or to proceed by writ of privilege, according to the circumstances of the case. 1 *Wils.* 273.

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within three days after the prorogation, and two days after the dissolution of parliament, before the time of privilege, as he alledged, was out. He was likewise charged in custody with several declarations. The defendant removed himself into *B. R.* by *habeas corpus*. (The return was produced in court to shew that he was a member, and affidavit made that he continued sitting till the end of the parliament.) The Judges of *B. R.* having conferred with the rest of the Judges, it was ordered to be argued again before them all.

The sum of the arguments made use of was as follows:

Serjeant *Chapple*, Serjeant *Darnel*, and Mr. *Strange*, for the defendant.

That there are three principal points in question: 1st, Whether the defendant is entitled to any privilege, and what it is? 2dly, Supposing he has a privilege, whether it appears he was taken up within time of privilege? 3dly, Whether he applies to the court in a proper manner in order to be discharged?

As to the first point, that members have some privilege *redeundi* after the dissolution of the parliament, was never before controverted; the reason that was the foundation of privilege still subsists, since it is but just that persons who have neglected their own private affairs for the public service should be secure from arrests, till they return to their respective habitations, where they may better provide for the settling their affairs. That there is no difference between prorogations and dissolutions, may appear from this, that prorogations are not nigh of the same antiquity as parliaments; two or three new parliaments being sometime called within the space of one year; and there were very few prorogations before the time of *Hen. VIII.* This privilege arises from prescription, and therefore must have been the custom in cases of dissolution, which only is antient enough whereon to found a prescription. Lord *Coke*, in his treatise of the court of parliament, says, "that prescription has made this privilege manifest to all persons." In Judge *Atkins's* argument about the power of parliament, p. 38, it is said, that there is a privilege both for coming to parliament and returning from it, laid down by prescription. The statute of 6 *Hen. VIII. c. 16*, which enacts, that no *member depart before the end of parliament without licence, under the penalty of forfeiting his wages, shews that they must have had a privilege of returning after the dissolution. By 8 *Hen. VI. c. 7*, it is enacted, that all clergymen called to convocation, and their servants, shall enjoy the same privilege in coming, tarrying and returning, as members of parliament do, which shews that members have a privilege for returning. Stat. 35 *Hen. VIII. c. 11*, enacts, that members shall have wages for coming and returning as well as during the sitting of the house. The charter *de foresta* extends the privilege which nobles, summoned to attend the King, had to kill two deer in the forest upon their first coming, to their return likewise. And 4 *Inst. 380*, these words in the charter are expounded of the nobles summoned to parliament. These two statutes seem to bear a near analogy to the present case. *Rastall's Entries.*

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Entries, 664, and the *Register*, 192, take notice of a writ *de feodo militis parl.*, in which are the words *pro expensis ad propria redeundo*. 4 *Inst.* 46, it is said that wages are due *veniendo, morando et erin' ad propr' redeundo*. 4 *Inst.* 192, there is a writ for levying wages for a time before and after parliament. *Scobell*, in his memorial of the orders, &c. of parliament, says, that members and their necessary servants have a privilege from arrests *eundo, morando et redeundo*: fo. 10 et 88. In the same book, 108, it is mentioned that one Mr. *Martin*, a member of the house of commons, was taken up twenty days before the meeting of the parliament, and discharged by order of the house, and that they came to a resolution, that that house was privileged from arrests for a convenient time both before the meeting and after the dissolution of the parliament. In a treatise about the manner of holding parliaments, by *Elsynge*, formerly clerk of the parliaments, it is said to be clear that such privilege has always been allowed: and a case is there mentioned of Sir *Thomas Sherley*, a member, who was taken up four days before the meeting of parliament, and was discharged, and the house came to the same resolution as in the former case. And indeed as the house of commons had always avoided fixing any certain number of days for the duration of their privilege, lest they might seem to curb the same, it is difficult to say exactly to what time it extends, but that they only insist upon a convenient time; the peers indeed have by an order of the house settled their privilege to twenty days before and twenty days after. In a preface to a treatise concerning the antiquity of parliament, written by Mr. Justice *Dodderidge* and others, there is mention made of a member of the commons, who, falling sick just before the rising of the house, and continuing some time, was arrested about six weeks after, and allowed his privilege. In *Scobell's* memorial above mentioned, fo. 110, it is said to have been laid down by the house in 1640, that every member has a privilege of fifteen days before and the like time after the sitting of the parliament. The case of *Thorpe* the *speaker, arrested in the time of *Hen. VI.* which was so strongly insisted on by the other side in the argument in *B. R.* is taken notice of in *Moor.* 346; and it is said to be during the interval of parliament, but is not mentioned how long it might be in that interval. Besides, *Thorpe* was arrested at the suit of the Duke of *York*. 1 *Brownl.* 91, a privilege of forty days is alledged and not denied, though indeed the court gave judgment against the defendant, but it was upon another point. In 2 *Lev.* 79, and 1 *Sid.* 29, in the case of the Duke of *Atholl* and Earl of *Derby*, it is said that some lords being consulted, said that they insisted upon twenty days before and after, but that the commons had always claimed forty: that in *Brook.* title *Privilege*, where the words are, that they have no privilege *tempore vacationis, sed tantum sedente curia*, they are only applied to servants; that there never was any doubt but that a member being taken upon mesne process had a right to privilege, though it was sometime a question where he was taken on an execution, lest the debt might be lost; but that

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that now it is established even in these cases, 2 *Edw.* IV. 8. *Moor.* 57. *Latch*, 48. *Dyer*, 59. 1 *Jac.* c. 3, even witnesses, juries, and barristers at law, have a privilege *eundi et redeundi* to and from the courts where their attendance is required. And in *Rastall's Entries*, 158, there is a writ for discharging even the servant of a jurymen, and it is much more reasonable that a person attending the high court of parliament should have this privilege than one attending the lower courts of justice.

As to the second point, it cannot be supposed that the convenient time for freedom from arrests was expired, since the parliament was prorogued only the 17th, dissolved the 18th, and the defendant was taken up the 20th of *April*: and it cannot be supposed that three days are a convenient time for retiring into the utmost parts of the kingdom for which this gentleman served, and where his habitation must be supposed to be, and all his concerns, papers, and vouchers lie; neither can he be imagined to have settled his affairs in town in so short a time as the space of two days. That the privilege of the high court of parliament ought not to be restrained in so strict a manner as that of a witness subpoenaed to attend a court of justice; but yet even in the case of a witness it has been determined, that a small deviation from the road shall not be a forfeiture of his privilege, as he may do it to provide sustenance or a horse for his journey. *Brook.* tit. *Privilege* 4; and it was adjudged, *Trin.* 13 *Ann.* in the case of *Hatch* and *Blisset*†, where a witness, who had given his evidence at the assizes at *Winchester*, was arrested in that town the day after, that so small a delay was no forfeiture of his privilege.

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*As to the third point, they apprehend they apply for relief in a proper manner, as of late years many things have been done by motion in court for the expedition of justice, which were formerly required to be acted with greater solemnity; in many cases where parties were formerly put to bring their *audita querela*, they are now relieved on motion. Persons arrested on a *Sunday*, and ambassador's servants, are discharged on motion, so as the witness in the above mentioned case of *Hatch* and *Blisset*. 1 *Sid.* 42, *Sir Richard Temple*, defendant in a trial at bar in *C. B.* moved that court to put off the trial, he being chosen a member in the ensuing parliament; there, no objection made that it could not be done in a summary way, but the court required a certificate of his being a member. In this case the return is laid before the court, and all the satisfaction given of his being a member that it can receive; that the necessity of the thing requires it to be done in a summary way, since very great inconveniencies will attend the determining it in the manner of a plea, for the defendant must remain in custody a long time before it can be tried, which will elude the benefit of privilege, and bring him into the same difficulties which that was established to prevent. That indeed no precedent can be shewn of
a member

† *Gilb. Cas.* 308. 4 *Bac. Abr.* 226.

a member of parliament being discharged upon motion, but that must be, because no one was before ever so hardy as to arrest a person entitled to privilege of parliament in so short a time after the dissolution.

Contra; Serjeant *Hawkins*, Mr. *Wynne*, and others, for the several plaintiffs.

That in the case of the plaintiffs in these suits there is no arrest, they having only charged him in custody by delivering declarations to the turnkey.

As to the first point, Whether the defendant is entitled to privilege after dissolution; that indeed a case had been cited, which ascertained the privilege of peers, but as to that of the house of commons there was such variety in the cases cited, such uncertainty in the times limited, that they could by no means be sufficient grounds whereon to found a legal prescription; that they apprehend there remains no privilege from arrests after the dissolution, since the reason which served for first creating it ceases, as there is no further trust reposed in them; nor has the public any further concern or interest in the security of the persons of them that were before their representatives; and *cessante causa cessat effectus*. That privileges of this nature ought not to be favoured nor extended, as they hinder the subject from recovering his natural right. That prorogations were much older than the time of *Hen. VIII.* as may be *seen by the titles of several statutes, 7 *Hen. IV. c. 15.* 11 *Hen. IV. c. 1.* where it is said, that parliaments had been divers times prorogued. And 1 *Hen. V. c. 1.* that the uniform language of the books is, that privilege is allowed *pendente parlamento, et sedente curia.* 4 *Inst. 48. Dy. 60. Brook. title Privilege, pl. 66. Cotton's Records, 596, 701, 704.* In Judge *Atkins's argument, 42,* a writ is mentioned that the members *dum in parlamento morantur arrestari et implacitari non debent*; the judgment on that writ has the same words. *Hakewill's modus tenendi Parl. 63, 808,* it is said that the parliament does not allow a privilege from arrests *tempore vacationis, sed tantum sedente curia.* The same book mentions that *Thorpe*, speaker of the lower house in the time of *Hen. VI.* was taken in execution in the time of vacation, and the house on their meeting presented a petition to the King and house of lords, that their speaker might be restored to them; and the † Judges being asked their opinions, the speaker was not returned, but a new one chosen. *Crompton, in his jurisdiction of courts,* makes use of the same expression as *Hakewill*, that privilege is allowed only during the sitting of the house. 4 *Inst. 54,* a writ is mentioned to be on the parliament roll, that members shall not be arrested *quandiu parliamentum duraverit.* 1 *Brownlow, 91,* is an argument against the defendant rather than for him, since it was given against the person alledging his privilege. The case cited from *Lev. 72,*

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† The truth of this case was, that the Judges avoided giving any opinion in it, for that the determination of the privileges of parliament belonged only to the parliament. 13 Co. 64.

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is the case of a peer. That the statute of 6 *Hen. VIII. c. 16*, which has been mentioned, can only shew that members were entitled to privilege during the session of parliament and while wages were allowed, it cannot be said that they claimed them forty days before and forty days after the sitting of the parliament; for in 4 *Inst.* 46, mention is made of a writ directed to a corporation to pay their burgesses their wages, wherein the whole allowance given *eundo, morando*, during the sessions, and *redeundo*, during the sessions, is but for twenty-one days. There is a case mentioned in the same book, that a parliament being called, and dissolved by the King's death, just before the sitting, it was doubted whether the members were entitled to any wages at all; and it was put upon this, that some precedent should be shewn for it; but it does not appear that any one was found. That if no precedent can be shewn for privilege after the dissolution, it is a strong presumption there is none. But last *Croydon* assizes a member of parliament was *subpana'd* as a witness, and Baron *Comyns* refused to discharge him.

As to the second point, that he should have a privilege for a convenient time to return, yet he has not set forth in his affidavit that he was returning, or even preparing to return to his proper habitation: but our affidavits swear that his constant habitation for two years last past has been within four miles of *London*, so that three days was above a convenient time: and it is plain he did not use *that legal diligence in returning that he ought to have done; so that it lies wholly at the discretion of the court whether they will discharge him or not. Witnesses attending a trial have the same privilege from arrests as members of parliament, and yet no precedent can be produced in which a longer time was ever allowed for their stay after they had given their evidence than till the day after. The case in *Brooke*, which says a small deviation shall be no forfeiture of privilege of a witness, is a strong argument that a greater deviation shall.

As to the third point, that as no case has been cited in which a member of parliament has been discharged on motion, it is a strong presumption no such thing ever was done. That he ought either to have brought his writ of privilege, or to have pleaded it. *Dyer*, 59, in the case of a member of parliament taken in execution, a writ of privilege is mentioned as a proper remedy. *Moor.* 340, *pl.* 461, *Dyer*, 295, *pl.* 47, Sir *Henry Finch*, speaker of the house of commons, wrote a letter to the court of King's Bench upon the arresting of a member of parliament, certifying that he was entitled to privilege in order to his discharge, but the court would not allow it, for that a special *supersedeas* ought to be sued out, reciting his privilege as a member. *Latch*, 148, 150. *Dyer's* notes, 60. *Noy*, 83. In the case of Sir *Richard Temple*, *Sid.* 42, cited by the other side, the court would not grant his motion, as he only made affidavit of his being a member, and demanded why he could not bring his writ of privilege. 1 *Keble*, 3, 13, *Salk.* 512, a peer being

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being arrested insisted to be discharged on motion, but the court were of opinion they could not do it. *Carthew*, 131. Lord Salisbury's case is applicable to the present. The reason why witnesses and barristers at law are discharged from arrests upon motion is, because it is a contempt of the court on which they attend, and it is commonly done by Judges of *Nisi prius*, and not by the court whence the process issues. Ambassadors servants are discharged on motion, because the stat. 7 *Ann.* (1) expressly enacts, that all process against them shall be void. The stat. 1 *Geo.* II. (2) which privileges seamen from arrests in suits under such a sum, impowers the court to discharge them on motion. The same provision there is in the act against mutiny and desertion; which shews it to be the opinion of the legislature that they could not be relieved on motion without that clause. That a writ of privilege is an expeditious way, which can cause no failure of justice. Attornies are never discharged on motion, *Salk.* 544. An attorney of the *C. B.* sued in *B. R.* applying to the court for a discharge by way of motion, was ordered to bring his writ of privilege, *Comberbach*, 49. 2 *Vent.* 154. The proper application is said to be by way of plea.

*Lastly, That it is submitted to the judgment of the court, whether or no the defendant by removing himself into *B. R.* by *habeas corpus*, has not submitted to the jurisdiction of the court, and become a prisoner by his own voluntary act. *Dyer*, 33; a clerk in Chancery was taken in execution in *C. B.* he sued out a *supersedeas* to the sheriff *quia executio improvidè emanavit*, and afterwards sued out his writ of privilege, but the court disallowed it, because they were in possession of his plea coming from his own-self; but said that had he not entered such a plea his privilege should have been allowed him. 2 *Roll's Abr.* 69. *Brook.* title *Privilege*. The clerk of the Hanaper was sued in the Exchequer, he imparled, and afterwards sued out his writ of privilege; but *per tot' cur'*, he had lost the advantage of it, because he had imparled, and by that confessed the jurisdiction of the court. 1 *Sid.* 29; Lord Ward pleaded his writ of privilege after imparlance, and the court would not allow of the plea.

Serjeant *Chapple* replied, that the acts of parliament cited, which allowed of application to the court by motion, shewed the reasonableness of the thing.

That as to the objection that the bringing the *habeas corpus* was a waiver of the defendant's privilege, and that there was no arrest in the case of the plaintiffs, he had neither pleaded nor imparled, whereby to admit the jurisdiction of the court; that he was taken by several *capias's* out of the *C. B.* and two *latitats* of *B. R.* before the charging him in custody with declarations, and therefore if the arrests appear to be illegal, the declarations must fall likewise as grafted on a wrong. That he was taken on those *latitats*, &c. before the bringing of the *habeas corpus*, and that it can never be

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interpreted,

(1) *C.* 12. s. 1.(2) Stat. 2. c. 14. s. 15. See also
32 *Geo.* III. c. 33. s. 22.

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interpreted, that removing oneself from a worse prison to a better is a surrender of oneself into custody. That nothing is more common than for persons under illegal arrests to sue out this writ in order to their being discharged.

Curia, May 27. Lord *Hardwicke*, C. J. delivered it in *B. H.* as the unanimous opinion of the eleven Judges who were present: the arguments, that the defendant was entitled to the privilege of parliament *redeundo*; that it was not necessary in this case to determine to what time it was limited, for supposing it to be only for a convenient time, the defendant was arrested within that convenient time, he having been taken within three days after the prorogation, and two after the dissolution of the parliament, and that consequently, his person ought to be discharged in a proper and legal manner: but that the remaining question is what is that proper and legal method, *whether by writ of privilege under the great seal upon record, or whether it may be done by motion upon affidavit. As to this point the Judges were all of opinion that a writ of privilege is a proper method to be taken for the discharge of the defendant's person; but there was a great doubt and some variety of opinions amongst them, whether the court would discharge him in the method now taken upon motion or not, no case having been produced from the books wherein any person entitled to the privilege of parliament was discharged after this manner. But it being a matter of consequence, and the short time between the arguments and the last day of the term being taken up in necessary business, the court was of opinion to enlarge the rule till next term without prejudice to the defendant's bringing his writ of privilege; and if the defendant does not think fit to bring his writ of privilege in the mean time, but insists on the method already taken, they will then give their opinion upon the matter, after having given it the consideration it will require, it being altogether a new proceeding.

The Judges afterwards (1) gave their opinion for the defendant's being discharged on motion (2).

(1) Viz. *Trin. 7 Geo. II.* See *post*, 37, and n. (1) 41.

(2) It is said that the rule to shew cause will not be granted on an affidavit only; but on attendance of the clerk of the crown, or his deputy, with the sheriff's return. 2 Bl. 788. It will be observed, that the decision in

this case relates to the member's privilege *redeundo* after dissolution; but he is also privileged for forty days after every prorogation, and before the next appointed meeting, 2 *Lev.* 72. 1 *Chan. Cas.* 221. S. C. See, however, 1 *Sid.* 99.

TRINITY TERM,

7 Geo. II. 1734. B. R.

PHILIP Lord HARDWICKE, Lord Chief Justice;

Sir FRANCIS PAGE, Knt.

Sir EDMUND PROBYN, Knt. } Justices.

WILLIAM LEE, Esq.

JOHN WILLES, Esq. Attorney-general.

DUDLEY RYDER, Esq. Solicitor-general.

HOLIDAY *and* PITT, &c.

Ante, 28. S. C.

THE defendant petitioned in Chancery, pursuant to the opinion of the Judges, for a writ of privilege directed to the justices of B. R. to discharge the defendant out of the custody of the marshal of that court; the Lord Chancellor *Talbot* ordered it to be moved in court, and took to him the assistance of the Master of the Rolls.

But the affidavits of notice to the several persons not being sufficient, the matter was adjourned.

And the Lord Chancellor took notice that the writ which the defendant prayed, was drawn up in order to discharge him not only from the suits recited in the writ, but from all others whatsoever, whereas he might be charged with other suits than those in B. R.

2dly, That the form of the writ which they prayed was varied from the common form; that they had recited that members of parliament had a privilege of returning, but as to their own case only said that the defendant was preparing to return; that the writ recited only, that he having been arrested was since charged with several declarations; whereas it might be material to mention the several times that he was charged with each, for that he might be charged with some since the time of privilege, and that it would be

As to granting a writ of privilege out of Chancery for the discharge of a member of parliament, arrested *redendo, quare*. A member of parliament arrested *redendo* may be discharged on motion *without* filing common bail.

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a matter of a very different consideration, and very doubtful whether or no those with which he was charged after time of privilege ought to be superseded; his Lordship added, that this was a question of as great nicety as perhaps ever was moved.

The Master of the Rolls asked the counsel for the defendant, whether they took this remedial writ to be in the nature of an original or judicial writ; they answered in the nature of an original; whereupon the Master of the Rolls told them they must then look for it in the Register, or else consider whether the statute of *Westm. 2*, which gives a writ in *consimili casu* extends to the present case.

The counsel for the defendant finding these difficulties arise as to the obtaining a writ of privilege, applied to the court of *B. R.* for the opinion of the twelve Judges upon that point which remained undetermined, viz. whether the defendant could properly be discharged by motion on affidavit.

The twelve Judges met again in order to take this point into consideration, Mr. Baron Carter, who was absent from the former argument, being then present; and on *July* the 3d, 1734, Lord Hardwicke declared in *B. R.*

That by the opinion of ten of the Judges against two, the defendant, as the law now stands, is proper to be discharged on motion.

The two Judges who dissented were the Lord Chief Baron Reynolds, and Mr. Baron Thompson; the former was only doubtful whether it could be lawfully done or no; the latter was more inclined to a positive opinion that it could not be done.

The main points on which the ten Judges founded their opinion are as follow:

There are two considerations in the present case; 1st, how the law stood as to this point of discharging on motion before the stat. 12 *Will. III. c. 3*. And, 2dly, Whether that statute has made any alteration in the law as to this point, and what alteration.

As to the first, all the Judges of *England* are of opinion that before the stat. 12 *Will. III.* the regular method to be taken by a member of parliament arrested within the time of privilege in order to be discharged by the courts of *Westminster* was to have sued out a writ of privilege; that writ was a *supersedeas* to the action. It might be, and generally was pleaded as a *supersedeas*; and in the instances in which the privilege of parliament has been pleaded the judgment of the court is prayed *si causam cognoscere velit et debeat*. In *Prynne's Register of Parliamentary Writs*, there is a chapter concerning this, page 660. And though this reasoning is not quite right, yet it is a very useful collection, for he has printed *verbatim* most of the records relating to this purpose. Thus the matter stood at common law.

As to the second consideration, whether the stat. 12 *Will. III.* has made any alteration in the law as to the matter of discharging, the ten Judges are of opinion that it has made two alterations; 1st, That

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That it has taken away the old plea to the jurisdiction of the court. And, 2dly, That it has made it illegal to arrest the body of any person having privilege of parliament.

As to the first, it enacts that any person may commence and prosecute any suits against any peer of this realm, or member of the house of commons, from and after the dissolution and prorogation of parliament or adjournment for above fourteen days, till a new parliament shall meet, or the same re-assemble, any privilege to the contrary notwithstanding. The intention of this clause is only to abridge the privilege of parliament. Then follows a proviso, that this shall not extend to the subjecting the persons of members having privilege to arrests. And then is an enacting clause, that any person shall have such process out of any court of record against persons having privilege of parliament, as they might out of time of privilege. And then it concludes negatively in this manner, but shall not imprison the body of any knight, burgess, &c. during privilege. The consequence of this act is, that it has made it lawful to proceed against any member after prorogation, &c. during time of privilege; therefore they cannot plead to the jurisdiction, whether the court ought to proceed in that action, since by this act an apparent jurisdiction is given: nor can they plead in avoidance of the writ or process, or *capias* or *latitat*, for that would be only in abatement; nor is there any instance of such a plea, if not given by act of parliament. In the case of *Widdrington and Charleton, Hil. 12 Ann.* †, where a man was brought in on an appeal by erroneous process, it was determined that as it was only to bring him in, he could not plead to the process, though he might to the jurisdiction or action.

Therefore since by this law persons entitled to privilege of parliament cannot have the old plea to the jurisdiction, the question is, *how they can take advantage of this privilege; and the ten Judges are of opinion, that it may be done by motion, and more especially upon this, that the act has now made the execution of this process by arrest of the body irregular and illegal.

This act has done two things; 1st, It has made a new method of proceeding against persons having privilege of parliament by summons and distress infinite, &c. 2dly, It has enacted, that no person having privilege shall be arrested or imprisoned. These last are negative words. They have also made this privilege part of a general act of parliament, of which the courts of law must take notice; and therefore do not necessarily want this privilege to be certified to them by writs as they did formerly. At that time this privilege was only founded upon usage, but now it is part of a general statute. But though the courts of law take notice of the privilege they can take no notice of the person of the member till it be made appear to them; and this is properly done by the return, as it was in the present case. In Sir *Richard Temple's* case, reported

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† 2 *Barnard. B. R.* 348. 10 *Med.* 86. *Str.* 155. 3 *Tr. Atk. Rep.* 570.



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ported in *Sid.* 192. *T. Raym.* 12. *Keb.* 727, the court told Sir *Richard* he must either produce his return, or plead his writ of privilege. *Vent.* 298; Lady *Huntingdon* was discharged out of custody on motion, because she was called in the writ by the name of Countess of *Huntingdon*. 2 *Salk.* 512; Lord *Banbury's* case a *latitat* was taken out against him by the name of *Charles Knowle Esq.* and the court said, that they would have discharged him on motion had the writ run in the name of Lord; and *Holt, C.* further added, that had his Lordship ever been called to parliament the court would have discharged him on motion. This importeth that had any matter of record been shewn, it might have been done on motion. In *C. B.* in the time of Lord *King*, *Mordington's* case†, his Lordship a *Scotch* Peer, as after the union enjoying the privileges of an *English* one, was discharged on motion, and the bailiff ordered to ask his Lordship's pardon.

Therefore it now appearing by matter of record, as the return of the writ is, that he was a member of parliament, it is brought to the case of a person arrested in an illegal manner, and may be compared to the case of an arrest on a *Sunday*; there the party is never put to plead in avoidance of the writ, but is discharged on motion; as in the case of ambassador's servants, where in the act there is only a declaratory clause, that the process shall be void: and the party is always given the most summary benefit of it by being discharged on motion, though the motion is never made to quash the process. Thus, as to the acts against frivolous and vexatious arrests, which enact that no person shall be arrested for a debt under £10 by process issuing out of any superior court, they institute a new manner of proceeding by serving the defendant with a copy of process; if a person is arrested the court discharges him on motion.

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On this consideration the ten Judges were of opinion, that since the stat. 12 *Will.* III. this is an illegal and irregular arrest, and therefore the defendant is proper to be discharged on motion. And that it is discretionary in the court to proceed either to discharge his person on a writ of privilege if brought, or in the manner now taken; and this is but similar to other cases in the law, as of witnesses, jurors, or parties to suits; the privilege on which they are discharged is the privilege of the court whereon they attend; and antiently writs of privilege issued out in these cases; a great number of which may be seen in *Rastell's Entries*. And though in these cases a writ of privilege may be brought, yet it is likewise the long established course to discharge them on motion. When this is done by the court on which they attend, it is as their own privilege, but when they are discharged by the superior court where the process issued, it is by taking notice of the privilege of the court below.

In the case of *Hatch and Silver* (†), mentioned in the argument the

† *Postum Rep.* 226.

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the witness was not discharged by the judge of assise, but the next term a motion was made in *B. R.* to discharge him, and this court took notice of the privilege of the court of *Nisi prius*; and this is as strong a case as that privilege was not certified by any matter of record.

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And the ten Judges are of opinion, that by putting this construction on the act of 12 *Will. III.* they make it the most remedial and easy to the party.

His Lordship added, that as to the matters insisted upon as a waiver of the privilege, the court could not take notice of them; but that they being by way of private contracts between the parties, if they are broken, they must take their remedy another way. That it has been generally held that no waiver of privilege is good but under hand, nor was there ever known any waiver of privilege against the person, but only to give a power of suing.

The court was of opinion that there was no occasion for a *superseas* in this case, as the marshal is an officer of the court, and therefore ordered a rule to be made for the discharge of the defendant out of custody, upon filing common bail (1).

(1) But see *N. B.* subjoined to the same case reported 2 *Str.* 990; upon the authority of which it was deemed expedient that the *placitum* prefixed to this and the foregoing report, should accord with that in *Strang.* See *ante*, note, p. 36.

### \*THE KING and WHITE and Others.

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**M**OVED for an attachment against the defendants, constables of *Scarborough*, for not obeying the Chief Justice's warrant, directed to all constables throughout *England*, to arrest a man for felony.

Attachment for a contempt lies for disobedience to a Judge's warrant.

And *per cur'*: The Judges of this court have power to grant warrants to be executed by all constables, &c. throughout *England*.

And disobedience to a Judge's warrant is a contempt of the court, and such a contempt as the court will take notice of by way of attachment.

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1 *Barnard. B. R.* 402, 440, 445. 2 *Str.* 976; [but not so full. *Cum.* 39. *And.* 111, n. *Ridgw. S. C.*]

**A** MOTION was made on the part of the defendant for liberty to amend his plea after joinder in demurrer, and the cause being set down in the paper to be argued,

Plea in *quo warranto* allowed to be amended after demurrer, and cause set down for argument.

An information in the nature of a *quo warranto* was granted against the defendant to shew by what authority he acted as mayor of *Chester*. By the charter of that city granted them by *Hen. VII.* all the citizens inhabiting in the city, suburbs and hamlets thereof,

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thereof, have a power to nominate two persons, out of whom the court of aldermen choose one for mayor. The defendant in his plea, after reciting this part of the charter, set forth that he was nominated by the major part of all the citizens, without adding inhabiting in the city, &c. so that the plea might comprehend not only the resident, but also foreign burgesses who had no right to vote in choosing the mayor. The prosecutors joined issue as to part, and likewise demurred as to the rest, and the defendant joined in demurrer; and the cause being set down in the paper, moves to amend his plea, and to make it conformable to the charter; affidavits were read that the plea was not put in, in the manner it was, purposely to gain time, but that it was merely a mistake of the counsel.

The prosecutors shew cause why it should not be amended. There were a great number of cases cited on the motion, but they are all taken notice of by one side or other in the present argument.

[ \*43 ]

\*Mr. Abney, Mr. Parker, Mr. Crowle, and others, shew cause against the amendment.

That in amendments the court has always gone by some one of the following rules; either that there be something to amend by, or that the fault arises merely from the misprision of the clerk, that no trial be lost. Another rule is, where the defendant willfully pleads a bad plea in order to injure the plaintiff, the court will amend it on prayer of the party injured. Another where the action would be otherwise lost. That the present case has none of these requisites.

That among all the cases cited by the other side upon the motion in order to justify this amendment, there were not above two concerning informations in the nature of *quo warranto*'s, and most of them were civil cases, not in the least partaking of a criminal nature, and therefore not applicable to the present.

That they may easily be distinguished from the present case, they are as follow:

The first case was that of *The King* and Sir *Hum. Tufton*, and Sir *John Ashley*, *Cro. Car.* 144, on an information in the nature of a *quo warranto*, wherein the entry of a judgment was amended. The case was this, judgment by disclaimer as to one charter was entered by consent; but the clerk entering the judgment had made the disclaimer general: however, as the paper books were fairly wrote otherwise, and the Attorney-general certified it to be a mistake, and consented to the amendment, the court said it was merely a misprision of the clerk, and likened it to a special verdict, which may be certified by the minutes of the clerk of the assise. But the present case is extravagantly different, as there is no consent, no misprision of the clerk, nor any thing to amend by.

*Jones (Will.)* 199. It is laid down as a rule that the misprision of the clerk shall not hurt the party, but that the errors of counsel cannot be amended.

That

That in the case of *The Queen and Symonds*, Hil. 12 Ann.†, where an information for perjury was amended after it had been filed, by the affidavits whereon the rule was made, there being sufficient matter to amend by.

The *King and Hays*, Hil. 1 Geo. II.‡, is cited by them as a strong case, where on an indictment for forgery, after trial and a special \*verdict found, a variance between the bond forged and the indictment was amended, but that was done at the prayer of the counsel for the King, who observed that the defendant had made a wilful blunder in removing the cause by *certiorari*, in order to get clear by arrest of judgment, and therefore it was amended according to the original indictment, which was right.

They also cited the case of *Foot and Prons*, Pasch. 12 Geo. I. on an action for a false return to a *mandamus*, the plaintiff declared against the defendant by the name of *Pons*, and after misnomer pleaded, leave was given to amend the declaration; but this was a civil suit (1). *Crockett and Jones*, Pasch. 12 Geo. I. 2 *Stra.* 734. 2 *T. Raym.* 1441, leave was given to add continuances in the record; but that was by the continuances on the roll, and also was a civil cause.

The case cited from 3 *Lev.* 347, was an action against the hundred for a robbery, and the amendment there was given for a special reason, for had the plaintiff been put to discontinue, the action had been lost, as the stat. 27 *Eliz. c.* 13, orders it to be prosecuted within a year.

So in the case of *The Duchess of Marlborough and Widmore* §, where the plaintiff declared only that the defendant was indebted to the Duke of *Marlborough* in his life-time, and after joinder in demurrer the court granted liberty to amend by inserting that he was since indebted to his executors, the plaintiff must otherwise have lost her debt, for the statute of limitations would have taken place.

*The King and Charlesworth*, 3 *Geo. I.* ¶, an information for forgery was amended after the record drawn, and made agreeable to the affidavits on which the rule was made, there being something to amend by; and it being a criminal suit, would have been wholly lost without it.

As for the case so strongly insisted on of *The King and Hughes*, which was an information in the nature of a *quo warranto* against the defendant for acting as mayor of *Liverpool*, and the defendant had said in his plea that he was sworn before a wrong person, and the record had gone down to trial, but was brought up again, and leave

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† See 2 *Stra.* 871.§ 2 *Stra.* 890. *Fitzgib.* 193, pl. 6.‡ *Barnard. B. R.* 31, 32, 142. 2 *Stra.* *Barnard. B. R.* 408.843. 2 *T. Raym.* 1518.¶ 2 *Stra.* 871. See *Andr.* 14.

(1) See 1 *Salk.* 50. 1 *Lord Raym.* 669. *S. C.* 1 *Stra.* 11. 7 *T. R.* 698:  
*Per Cur. Hil.* 32 *Geo.* III. *C. P. Imp. C. P.* 228. 2 *Tid.* 710.

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leave given to amend by Lord *Raymond* after a long argument at his chambers: that was only the opinion of a single Judge; and was also on condition that the trial should not thereby be delayed.

That the case of *The King and Mayor of Chichester, Show.* 273, was rather in their favour.

\*The case cited from 2 *Mod.* 167, an action on a false return of a member of parliament on the stat. *Hen.* VI. where leave was given to amend after joinder in demurrer, is a very loose note, and an anonymous case.

That as to the case of *Wilks and Rich*, 11 *Mod.* 133, *pl.* 13. 6 *Ann.* an action on covenant that the defendant would not act after such a day, where the breach was assigned *posthac*, &c. and after joinder in demurrer, and the cause set down in the paper to be argued, leave was given to amend; it was a civil suit.

That in the case of [*Regina v. Bury*,] *Malsbury* †, [*Pasch.*] 9 *Ann.* where the defendant took advantage of the misnomer of a corporation by pleading it in abatement, and yet it was amended; there was no loss of trial.

That in *Brearecroft's* case cited from 3 *Lev.* 344, the plaintiff lost his own trial, as was done also in the case of *Chisley and Becket*, (cited in the foregoing case) which was an action for a false return of a member of parliament on the stat. 8 *Hen.* VI. The plaintiff declared of an election by the mayor, bailiffs and burgesses, instead of the mayor, bailiffs, burgesses and freemen of *Redford*; and the court gave liberty to amend after the record had gone down to trial, but was withdrawn, and the court moved the next term.

That the defendant had drawn an argument from 9 *Ann. c.* 20, that as that act extends the statute of *jeofails* to informations in the nature of *quo warranto's*, it must be from thence intended that they are civil suits. But the contrary is plain from thence, that there was need of an express clause to that purpose; and the fine set in a *quo warranto* shews it no civil suit.

That this proceeding would evade the statute of 9 *Ann.* which was partly made in order to try the right of annual officers within the year.

That here is a trial lost; for though the array might possibly have been challenged, had the trial come on, yet as an assizes had slipped over, the court would intend this trial lost.

The case of *Sir John Poole*, *Poph.* 128, three executors brought an action of debt, one only declared, and when the cause was ready for trial, it was moved to amend the declaration by inserting the names of the other executors, but denied, for that it could not be done without consent.

[ \*46 ]

\*In the case of *The King and Glemham*, *Poph.* 144, in an information in the nature of a *quo warranto* the Attorney-general after three years withdrew his replication, and put in a new one, where-

upon

† [*The King v. Somers*,] 2 *Str.* 739. [2 *Lord Raym.* 1472, S. C.]

pon the defendant moved to plead in bar *de novo*, but denied *per ar.* In the case of *The Attorney-general and The Corporation of Trinity-house*, in an information in the nature of a *quo warranto*, Sid. 55, the defendants had liberty to amend their plea before the joinder in demurrer; but it is there said that had they joined in demurrer it would not have been granted.

*Contra*, Mr. Hussey, Mr. Bootle, Mr. Strange, Mr. Noel, Mr. Taylor, and others, for the amendment.

That as to the cases cited from *Poph.* by the other side, one was where an executor desired to amend by adding the names of the others; that would really have been making it a new action, and the plaintiff might as well have discontinued, which they cannot in the present case. That as to the case wherein the Attorney-general put in a new replication, there was no reason why the defendant should plead *de novo*, since that being precedent to the replication could not be affected by the alteration of it.

That a very slight or no answer had been given to all the cases, and that there remain many more unspoken to.

The case of *Mostyn and Totty in Scaccario*, 3 Geo. II. is a stronger case than the present. It was an action on the case for the damage done by the smoke of a smelting-house: there was a demurrer to the declaration by a country counsel, *quia narratio falsa*.

Joinder in demurrer, and the trial lost, and after the cause was set down to be argued, there was an application to the court to withdraw their demurrer and plead to issue, and it was granted, because it seemed that the defendant might have a good plea upon the merits.

2 *Saund.* 401. *Vent.* 221. In trespass for breaking the plaintiff's close, the defendant pleaded that his corn was upon the close, and that he entered to take it off. There was a demurrer, and on an argument from the paper, *Hale*, C. J. was of opinion that the plea was bad, since the defendant should have shewn title to the corn, otherwise it would be presumed to be the corn of the plaintiff as being on his ground, but nevertheless leave was given to amend.

\* *Brownjohn and Doyley* †, *Hil.* 8 *Ann.* the defendant in replevin avowed the taking for rent reserved on a lease for years made 1707, instead of 1708, and after joinder in demurrer leave was given to amend.

In the case of *Lord Gage and Robinson* ‡, in a declaration in replevin the *locus in quo* was mistaken; the defendant pleaded that the place of the taking was elsewhere, and yet the plaintiff had liberty to amend. *Garner v. Anderson* §, 3 *Geo.* I. a parallel case.

*Murdum* in an indictment amended to *Murdrum* in the case of *the King*; and this was a criminal suit.

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† Cited 2 *Str.* 846.

‡ *Str.* 11; [cited *Cun.* 42. 3. C.]

§ *Str.* 11.

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In the case of *Hatton v. Walker* †, 3 Geo. II. after a special demurrer and joinder in it, the court gave leave to amend the very cause set down for demurrer by the counsel's draught. In the case of *Dummer and Alworth*, *Barnard. B. R.* 291, there was a demurrer for a variance between the declaration and the bond in which the name was *Dummall*, and yet leave was given to amend according to the bond.

*Cro. Car.* 147, *Forger and Sales*.

In the case of *The Duchess of Marlborough and Widmore* there was nothing to amend by. And in the case of *Hatfield and Grosvenor*, cited in the case of *Widmore*, the party had liberty to amend, though the cause had thrice gone to trial.

That numberless cases of amendments after joinder in demurrer had been cited; that as to amendments the cases shew there is no difference between civil and criminal suits; this must also be esteemed a civil suit, nor can the fine prove otherwise, since before the 5 & 6 Will. & Mar. c. 12, there was a *capias pro fine* in several actions.

That it is rather to be amended, because had their plea been so bad as not to traverse the usurpation, there was no necessity to have demurred, but the prosecutors might have gone to trial on the issue joined, and a verdict for the crown would certainly have been well; and had the defendant had a verdict, yet judgment would have been given for the crown, since he had shewn no title in his plea; as in the case of *The King and Philips*, of *Bodmyn* ‡, *Stra.* 394, where after an immaterial verdict for the defendant judgment was given for the crown. *Broome and Rice*, 2 *Stra.* 873. *Trin.* 4 Geo. II. in an action of trespass there was a verdict for the defendant, and by reason of the bad plea confessing the action, judgment for the plaintiff. See this case fuller in the case of *The King and Poole ante*, [23.]

[ \*48 ]

\*That the counsel certifying in this case that it is a mistake, bring it within the reason of *Ashley's* case, where the Attorney-general certified.

As the plea says, according to the form of the letters patent, it is submitted to the court whether there is not the charter to amend by. In the case of *The King and Hughes* there was nothing to amend by.

2 *Mod.* 167, has received no answer, the case is very full in the book.

That there is no difference whether the plaintiff or defendant moves to make the amendment as long as there is no fraud in the pleadings, nor any real prejudice to the other party.

That as to danger of losing the action, which is said to be the cause of granting amendments in some cases, that will serve strongly for the defendant, who must inevitably lose his office if he does not amend.

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† 2 *Stra.* 846. *Barnard. B. R.* 215, ‡ 9 *Hen.* VI. 37. pl. 12. 2 *Rel. Ab.* 230. 99. pl. 1. *Salk.* 173. *Yels.* 169.

That amendments have of late been much extended for the sake of justice, and to give the parties an opportunity to try the right.

*Curia.* Lord *Hardwicke*, C. J. That this was a question of consequence, and very fully argued on both sides, but that upon his attention to the whole, he was of opinion that the defendant should have liberty to make his amendment.

That this was not an amendment given by any of the statutes of jeofails, but wholly founded on the common law, and the discretion of the court.

That it was antiently the rule not to suffer any of those amendments to be made after the matter was on record; but the number of cases now cited shew that of late in furtherance of justice, and in order to obtain the right between the parties, these amendments have been much extended.

That these amendments are hardly reducible to any certain rules, (though it were to be wished they could be) since they have been so much extended. The cases cited shew that the rules laid down by the gentlemen against the amendment will hardly stand in any one point; so that nothing more can be inferred from thence, than that those amendments at the common law are wholly discretionary in the court. In amendments before trial it is no rule that there can be something to amend by; after judgment it may be more necessary. Another rule was laid down that the mistake must arise from the misprision of the clerk; but in many cases errors in law occasioned by the mistake of the pleader have been amended. That there is no authority in which it is cited as a certain rule to tie up the hands of the court in making amendments that no trial be lost, for the necessary preparations for an argument on demurrer must usually occasion that delay. That another rule is laid down, that where the faultiness of the plea is wilful, the party injured may on his prayer have it amended, though the other party may not; and this indeed may be a true rule. It is certainly a stronger inducement to the discretion of the court to grant an amendment if the party would otherwise lose his action, though it is no rule; and in the present case it is an inducement equally strong, that the defendant must lose his office without this amendment. Many cases shew that amendments may be granted after joinder in demurrer and argument thereon, as 2 *Saund.* 401. *Vent.* 221.

One objection chiefly relied on this case is, that it is a criminal suit, and therefore cases of amendments in civil causes are not applicable to it; but there is no such distinction made in the books as to amendments at common law; as to amendments on the statutes of jeofails it may be true, since there are express words in them to that purpose. In the case of *The Queen and Touchin*, *Salk.* 51, it was the opinion of Mr. Justice *Powell*, that amendments may be granted equally in criminal, as in civil matters. Indeed the case of *Cox and Wilbraham*, *Salk.* 50, is somewhat different. Neither does this seem to be a criminal suit, it being a doubt

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doubt which divided the twelve Judges in the case of *Shaftsbury*, whether informations in the nature of *quo warranto* are civil or criminal suits: but they rather partake of both natures, though more largely of the former, especially since the act of 4 & 5 Will. & Mar. c. 18, which reduces them almost to a civil action.

The case of *Hughes*, though it is the single opinion of Lord *Raymond*, yet it is a great one, and was never complained of nor excepted against.

Another objection is, that they have lost a trial: and though this is no rule, yet it might be a strong inducement to the court not to grant this amendment, but then to make it any inducement it is necessary that it appear to have been lost merely on account of this mistake. But it is sworn on the contrary, that had it been brought on it would have gone off on a challenge, and therefore the prosecutors consented to put it off.

[ \*50 ]

\*Another objection is from the inconvenience arising from this proceeding, as it tends to frustrate the intention of the 9 Ann. c. 20, which was partly made for the more speedy trial of those informations, that the right of annual officers might be determined within the year. And indeed had this had plea been wilfully put in for that purpose, it would have been a great inducement to the court to have refused this amendment; but as it is on the contrary sworn to have been a mistake, that is out of the question, and the defendant might have obtained his end by writ of error; for which in these matters to try a right, the Attorney-general always of course on any probable cause shewn grants his *fiat* though not on indictments or informations for misdemeanors.

The court concurring in opinion, leave was given to the defendant to make this amendment on payment of costs, and being bound to plead time enough to go to trial the next assises (1.)

(1) See *Andr.* 109, where a plea in *quo warranto* was allowed to be amended after issue joined and cause made a *remanet*; but there must be time for trial, and no trick apparent, *Andr.* 111. See *Jordan and Twells*, 171, *post.* As to other cases of amendments in penal actions in general, see 5 *Burr.* 2833. 2 *Burr.* 1098. 6 T. R. 543. 7 T. R. 55,

where the charge was refused to be altered: so, where the action had been four years depending, though the proceedings were yet in paper, 2 T. R. 707. Nor where the plaintiff has unnecessarily delayed the cause, 6 T. R. 171. 8 T. R. 30. See further as to amendments, 2 *Tid.* 709, *et seq.* edit. 1812. *Pr. Dic.* tit. *Amendment.*

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2 *Barnard. B. R.* 357, 386, 441. *Kely.* 194. 2 *Str.* 971. *Andr.* 154.  
[*Cum. 44. Edgew.* 21.]

## THE judgment of the court.

Lord *Hardwicke*, C. J. declared it to be the opinion of the whole court, that the judgment of the court of *K. B.* in *Ireland* awarding the whole damages *pro valore dotis a morte viri et damna occas. detentionis dotis* against the surviving tenant *Kent* singly is erroneous (1), and that it be reversed; but that the judgment of affirmance in awarding the widow seisin of her dower be affirmed; and that as there are two distinct judgments, one given on a statute, and the other on the common law, one part might be affirmed, and the other reversed. *March*, 88. *Salk.* 24. *Farres.* [7 *Mod.* 152,] 154. [S. C.]

As to the first question, which is general, whether or no the *K. B.* in *Ireland* could give any judgment for the value of the dower after the time of the first judgment; thus far is clear, that that court ought to give judgment for the value of the dower till the time of the affirmance of the judgment. But this is not founded on the statute of *Merton*, for no authority is thereby given to superior courts, where it comes by writ of error from those below, to give judgment for the value till the time of affirmance in their courts: but as this was a plain defect, the statute 16 & 17 *Car. II.* c. 8, was made, in order to give them such power. This *English* act appears from the *Irish* statute book to have been made a law in that kingdom the 18 *Car. II.* so that in general they did right in giving judgment for the value till the time of affirmance.

\*But then they could not give such judgment as they gave in this particular case, viz. the whole value of the dower from the death against the surviving tenant *R. Kent* singly.

There is indeed some colour of reason that for the first period of time till the death of *May* the first tenant, the surviving tenant receiving the profits as a trespasser, he only ought to be charged; but this must be wholly taken on the 16 *Car. II.* and the heir of *May* joining with the other surviving tenant, has equally subjected himself to that statute, he having entered into a recognisance under a condition that as plaintiff in error he shall pay the damages if judgment be affirmed.

But yet there remains a stronger objection not taken notice of at the bar, which is, that judgment was given for damages without awarding a writ of inquiry, which is expressly directed by the statute.

As

(1) By the "whole damages" here mentioned, it seems, that not only the original damages were awarded against the surviving tenant, but also the value

Where there are two joint tenants in dower, and one dies after judgment, upon which his heir and the surviving tenant bring error, the value from the time of the judgment to the affirmance should be against them, and not against the surviving plaintiff in error only. And although such judgment be for the benefit of the heir of the deceased tenant, yet he may join in assigning it for error. And damages from the time of the judgment to the affirmance cannot be computed by the court, but a writ of enquiry, under 16 & 17 *Car. II.* must be awarded.

[ \*51 ]

16 & 17 *Car. II.* c. 8.

from the time of the first judgment to the affirmance. See 2 *Str.* 971. S. C. where this distinction is more apparent.

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As to the last question, whether the writ of error could be brought by both tenants, since the judgment only prejudiced one of them; it is indeed the general rule, that a person cannot assign the writ for error which is for his benefit, *Cro. Eliz.* 891. *Saund.* 23. *Yelv.* 3. *Cro. Jac.* 92. But this rule must be understood with this restriction, viz. where it arises from some fault in the process. But here it is an error in the manner of giving judgment in chief and in that case, for the sake of regularity, it may be assigned. *8 Rep.* 59. *2 Saund.* 49. *Yelv.* 107.

There now arises a new consideration, which is, what judgment this court ought to give upon the reversal of the former; the general rule being, that the court that reverses the judgment below should give the same judgment as the inferior court hath given. *Cro. Car.* 442. *Salk.* 401. But in the present case this court cannot award execution, as we have no jurisdiction to send our writs to the sheriffs of *Ireland*, but can only command the King's Bench in *Ireland* to do it. *Cro. Jac.* 574. We are therefore all of opinion, that this court can do nothing in this case but remit the record, and command the King's Bench in *Ireland* to award a writ of enquiry, and after to give execution for the value of the dower against both tenants. This is agreeable to the practice of the Exchequer-chamber, who, when they reverse the judgment of this court, order them to award a writ of enquiry and execution on the return of it. *Cro. Jac.* 206, [534] *Yelv.* 74. *Carth.* 180. [*Cro. Car.* 511.]

[ \*52 ]

\*The judgment of this court is, that the judgment of the *C. B.* in *Ireland*, and the judgment of affirmance in *B. R.* in the same kingdom, as to the seisin of dower be affirmed, and the other part of the judgment be reversed: and that the court will order them to award a writ of enquiry and execution thereon (1.)

(1) Although by statute 23 Geo. III. c. 38. s. 2, "no writ of error or appeal shall be received or adjudged, or any other proceedings had by, or in any of his majesty's courts in this kingdom, in any action or suit at law or in equity, instituted in any of his majesty's courts in the kingdom of *Ireland*;" yet since the union a writ of error lies from the superior courts of that country to the House of Lords here.

### JASPER and GROSVENOR, *Executors* of PEAKE.

2 *Barnard. B. R.* 457. *S. C.*

A defendant, an executor, disabled by palsy from speaking, and also from writing his name, was, upon an undertaking that in the meantime he should prefer no creditor to the plaintiff's prejudice, allowed time to plead; and, the disability continuing such time, upon the defendants consenting to a respite to try the following term, was further enlarged.

IT was moved last term on the part of the defendant for time to plead till this term, for that the defendant ever since he had been executor had been so ill of a dead palsy that he was not able

ask or write his name, so that he could not sign a renunciation, any instrument to his attorney, and that it was an affair of trade which no one knew but the defendant. It was granted on condition that he would not confess any judgment, or give licence to any creditor to the prejudice of the plaintiff (1). The motion was repeated this term for further time to plead till Michaelmas next, the defendant still remaining in the same circumstances.

And *Hurdwicke*, C. J. Though this inconvenience arising from the act of God entitles the defendant to favour and compassion, yet must not be carried so far as to hinder the plaintiff from recovering his right, which may now be the case, as nothing is laid before the court to shew that there is any probability of the defendant's recovery; but that if the defendant is reduced under such circumstances as not to be able to transact his affairs, it is sufficient to sue out a commission in Chancery to take him into custody, when the plaintiff will know what persons to come upon for his debt (2). That this was done in the case of *Pitt*, who, having lost speech by an apoplectic fit, though he shewed some signs of recovery, had, after great litigation in Chancery, a commission taken out against him. The court at length allowed the defendant farther time to plead, upon his consenting to be bound in a rule to plead enough to have the issue tried in Michaelmas term next.

*B.* It was determined that an executor named in a will may sue before the probate, though he cannot sue. *Per Powell*, J. 302. An executor may commence an action before probate though he cannot go on so far as to declare † (3).

† *Plowd.* 280 b.

The usual condition annexed to a writ for time to plead obtained by an executor or administrator. 8 *Mod.* See also 1 *Bulstr.* 122, 3. *King v. L.* E. 31 *Geo.* III. C. P. *Imp.* 185.

But insanity is no ground for an action for a discharge out of custody. 4 T. R. 121. 2 T. R. 390. Nor

for the exoneration of the bail. 6 T. R. 132. 2 *Bos. v. Pul.* 362; but the court will grant an *habeas corpus* for an insane person being brought up to be surrendered on their discharge. 3 *Bos. v. Pul.* 550.

(3) See the cases collected, 1 *Salk.* 303, n.

### \* FRANCIS and NASH.

On a motion to set aside an execution on a judgment confessed for irregularity. Resolved, That where judgment has been entered with an express *cesset executio* till a certain time, and execution

Execution issued within the time specified by a *cesset executio* set aside.

Verbal agreements are stated as a ground for staying execution, the court will not interfere, but the party to his remedy in Chancery. Nothing that cannot be sold can be taken in execution; as deeds, writings, &c. Bank notes cannot be taken in execution.

But where long

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cution is taken out within that time, the court may set it aside; but where there are long collateral agreements, and the defendant alleges that by reason of them execution ought to stay, this court cannot enter into and try the equity arising on them, but the defendant, if aggrieved, must apply for relief in Chancery.

2dly, Nothing can be taken in execution that cannot be sold, as deeds, writings, &c.

3dly, That bank notes, &c. cannot be taken in execution (1), for though they are assignable over, yet notwithstanding they remain in some measure *choses in action*, and the sheriff or his bargainees cannot bring an action on them without assignment, notwithstanding the act† for assigning them, yet they are so much things in action that it was necessary to have a new‡ act in order to make the stealing them felony (2).

† Stat. 5 W. and M. c. 20, s. 29.

‡ Stat. 2 Geo. II. c. 25, s. 3, perpetuated by 9 Geo. II. c. 18.

(1) 9 East. R. 48. 4 East. R. 510.  
S. P. 1 Doug. 231, *contra*; but then, as  
observed by Lord Ellenborough, C. J.  
9 East. R. 48, it passed by consent.

(2) For the first point, this case  
cited 2 Tid. 981. See also 1 Mod. 2  
For the third and last point, this case  
cited 2 Tid. 989.

### CLERKE and COMER.

Judgment for  
the plaintiff in  
C. P. upon ar-  
ticles restraining  
the defendant  
from setting up  
his trade within  
the bills of mor-  
tality, affirmed  
in error, *K. B.*

AN action of debt on articles; that plaintiff taught the defendant his trade, on condition that he would not set up within the bills of mortality under the penalty of £44. The action was brought in C. B. breach was assigned, the defendant demurred to the declaration, and the plaintiff had judgment. On this a writ of error was brought in B. R. and judgment was affirmed upon the authority of the case† of *Chesman and Manby*, affirmed in the House of Lords with costs, *Hil. 13 Geo. I.* upon the foundation of the case of‡ *Mitchel and Reynolds*; in each of which it was adjudged that an action will lie on breach of such articles.

† 2 Ld. Raym. 1456. Fortesc. Rep. 297.  
2 Stra. 739.

‡ 1 P. Will. Rep. 181. 10 Mod. 2  
85, 13. Fortesc. Rep. 296.

SHEPHAR

## SHEPHARD and BRAND.

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2 *Barnard*. 463, S. C.

ON a motion to set aside an award made on a rule of reference to the three foremen of a special jury; exception was taken, 1st, That the arbitrators had taken upon them to give a particular sum for costs, which should have been left to the taxation of the Master. 2dly, That they had also taken money of the plaintiff alone for their charges without any bill delivered in (1), before the making their award.

Lord *Hardwicke*, C. J. Arbitrators who are judges to determine finally the differences between the parties, may, if they think fit, take upon them to inquire of and give costs as well as damage; and this court has no power to take notice of it, any otherwise than if they are excessive, without any reason given for it, as an evidence of some undue practice (2).

That as to the second point, where arbitrators, let their characters be otherwise never so unexceptionable, take money of one of the parties singly, whether for charges or any thing else before making their award, as this is a matter of so tender a nature, that even the appearance of evil in it is to be avoided, and this practice may be of dangerous example, it is sufficient cause to set aside the award; for if this should be suffered, it will be hard to distinguish what is corruption (3).

The court will not interfere where an arbitrator, under a rule of reference, awards a particular sum for costs, unless it be excessive, and then only by considering the excess as evidence of undue practice.

Where an arbitrator takes money, whether for charges or any thing else, before making his award, it will be set aside.

[ \*54 ]

(1) From a report of the same case, 2 *Barnard*. 465, it appears the arbitrators, before making their award, had insisted upon three guineas a-piece being paid them by each of the parties for their trouble and expences, and that the plaintiff paid the whole money.

(2) Cited 2 *Tid*. 826.

(3) Although, on the ground of corruption, it has been objected to, it seems, that an arbitrator may employ the attorney of the party in whose favour the award is to be made, to prepare it. 1 *Barnard*. 450.

## SMITH and HICKSON.

2 *Barnard*. 465. 2 *Str*. 977. [ *Cus*. 52. ] See *Com. Dig.* Tit. *Baron and Feme*, 107. S. C.

IN arrest of judgment. The plaintiff brought an action against the defendant for a malicious prosecution in indicting him and his wife for receiving goods knowing them to be stolen. The plaintiff sets forth in his declaration that the bill preferred against them was found *ignoramus*, and that he had thereby suffered great damage in his reputation and trade, and had been at great charge and cost in defending himself, and likewise at great cost and expence in defending his wife in this prosecution. The defendant pleaded Not guilty. The verdict found as to the prosecution against the plaintiff himself, for the defendant, and as to the prosecution against the wife, for the plaintiff.

Serjeant *Eyre* moved on behalf of the defendant in arrest of judgment.

The husband, alone, sued for a malicious prosecution of himself and his wife; verdict for the defendant, as to the prosecution against the husband; and for the plaintiff as to the prosecution of his wife; notice in arrest of judgment, upon the ground that the wife ought to have joined in the action; denied.

E 2

1st, That

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[ \*55 ]

1st, That a man cannot sue alone for damages done to his wife but both baron and feme must join in the action, and therefore the finding for the plaintiff only as to that part of the declaration which concerns the wife, is, if any thing, a finding for the defendant, and consequently they ought to have found costs for him. *Cro. Eliz.* 147, 157, 584. 1 *Leon.* 299. 2 *Andr.* 48.

\* 2d, That as there was but one issue the verdict was ill, as finding one part for the plaintiff, and part for the defendant.

Serjeant *Chapple*, for the plaintiff. That had this been an action on a contract the whole declaration must have been proved, as the jury must have found wholly for the plaintiff or for the defendant, the issues being joint. But in actions on torts the issues are several, and it is sufficient to prove any one charge in the declaration, and the jury may find part for one and part for the other. *Cro. Eliz.* 884. In an action on the case the plaintiff declared that the defendant sold to the plaintiff two oxen, warranting them to be sound, when in fact they were not so. The defendant pleaded Not guilty; the jury found for the plaintiff as to one of the oxen, and for defendant as to the other. On a motion in arrest of judgment the court were of opinion, that as it was not on the contract but on the tort, the action was good. 1 *Sid.* 5. In an action of debt against the sheriff for an escape, the declaration charged that husband and wife were taken in execution and escaped: the jury found that the husband did escape, but that the wife was not taken in custody, nor had escaped: and *per curiam*, it was the same thing as no mention had been made in the declaration about the escape of the wife, and the verdict good.

2dly, That as the husband had here sustained special damage on account of the prosecution against his wife, he might bring his action to be repaired in these damages without her joining with him.

*Cro. Car.* 553. An action was brought by baron and feme for malicious prosecution, and on a writ of error it was insisted that they could not join in that action; there does not appear any judgment reported in *Cro.* but in *Jones (Will.)* 440. March 47, it is said to be determined, that they could not join in such an action where the husband had sustained the whole damage; indeed where the wife had an interest they might.

Lord *Hardwicke*, C. J. and *curiam*: The general distinction taken between torts and contracts is right: in contracts it is necessary to prove all the charges in the declaration exactly in the manner they are laid (1): but in torts they are several, and if you prove one of them, you sufficiently prove your case.

2dly, That in the case of *Saville and Roberts*, reported in *Sall* 13 †, it was determined by *Holt*, C. J. that an action for a malice

ON

† Lord *Raym.* 374. 5 *Mod.* 394, 405. *Carth.* 416. [2 *Vin.* 25, pl. 41.] *Hol* 150, 193. 12 *Mod.* 208, 211. S. C.

(1) 1 *Leon.* 299. *Cro. Eliz.* 147, 157, 524. *Comp.* 766. 1 *Doug.* 183. 2 *Dougl.* 669, n. 1 T. R. 447. See also *Lances on Pleading*, 429.

ous prosecution where the bill is found *ignoramus*, will lie only where \*the prosecution imported matter scandalous and infamous to the party, and not where it had only put him to expence: but this matter came again principally to be considered when Lord *Macclesfield* was Chief J. of this court, in the case of *Jones and Gwyon* †, relating to badgers and chapmen. In this case there was no pretence that it tended to the infamy of the party, but only that it had put him to expence; and it was there resolved that there was no ground for the distinction made in the case of *Saville and Roberts*; but that though the indictment were insufficient or found *ignoramus*, an action on a malicious prosecution might as well be sustained where the party was put to an expence only without infamy, as where the matter of the prosecution was infamous and scandalous (1).

That had the law now stood upon the opinion of C. J. *Holt*, the verdict would have been bad: but as it now stands upon the last determination, the plaintiff might alone maintain the action, by reason of the special particular damage he sustained in defending his wife, as in the case of an action by the husband alone for assault and battery of his wife *per quod consortium amisit*.

The plaintiff had his judgment (2).

† 10 *Mod.* 148, 214. *Gillb. Cas.* 185. *S. C.*

(1) See also 1 *Str.* 691. *Cro. Jac.* 490. (2) See also 1 *Salk.* 119, n. [b].  
4 *T. R.* 247.

### BIRCHMAN and NORIGHT.

IN an ejectment brought by an infant a motion was made for a rule to compel the lessor of the plaintiff to make a real lessee who might be responsible, or to give security for the payment of the costs: this being determined to be the course of the court in the case of *Throgmorton and Smith on the demise of Miller* †, and before in the case of *Noke and Wyndham* ‡. A rule for that purpose was granted (2).

In ejectment where the lessor of the plaintiff is an infant, security must be given for costs.

† 2 *Kel.* 65. pl. 17. 2 *Barnard. B. R.* ‡ *Stra.* 694.  
140. 2 *Stra.* 932.

(2) And see *Bar.* 193. *Cowp.* 128. *Bull. N. P.* 111.

NICHOLS

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SMITH  
and  
HICKSON.  
[ \*56 ]



TRINITY TERM, 7 GEO. II.

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NICHOLS and SUTCLIFF.

*Nihil debet* allowed to be withdrawn, and *non assumpsit* pleaded.

[ \*57 ]

IN an action on the case on *assumpsit* it was moved on behalf of the defendant for leave to withdraw the plea of *nihil debet*, which he had put in, and to plead *non assumpsit*. The following cases were cited to shew that the court had granted this liberty before. In *Eads and Mason* †, it was moved to withdraw the general plea *non assumpsit*, and to plead a tender as to part, and *non assumpsit* to the rest, and granted. In the case of *Mostyn and \*Totty*, 3 Geo. II. in *Scacc.* the court gave leave to withdraw his demurrers, and plead the general issue.

Granted on the common terms of payment of costs and taking short notice of trial(1).

† 2 *Barnard*, B. R. 139. S. C.

(1) In *K. B.* the liberty to withdraw a plea for the purpose of pleading specially, 2 *Str.* 966, 1181, 1 *Wils.* 177, 254, 1 *Bl. R.* 357; or to plead it again with a notice of set-off. 2 *Str.* 1267; or upon bringing money into court, *id.* 1271, 1 *Wils.* 254, S. C. cited seems to depend upon whether any delay or inconvenience will thereby be experienced by the plaintiff.

MIDDLETON and his WIFE versus CROFT.

2 *Str.* 1056. *Andr.* 57, [326, 395.] 2 *Barnard*. B. R. 351. 2 *Atk.* 650. 2 *Kel.* 148, pl. 124. [*Ridgw.* 109. *Cum.* 35, 114, 326, *post*, &c. and as to another point, 395, *post.* S. C.] 4 *Fin. Abr.* 320, pl. 14. S. C.

Lay persons are not within the canons of 1603.

The stat. 7 and 8 Will. III. hath not, by inflicting a penalty upon a clandestine marriage, taken away the jurisdiction of the spiritual court as to such marriages.

THE plaintiffs now libelled against in the ecclesiastical court of *Hereford* for marrying without banns published, or licence, and in a private house, and out of canonical hours: upon this they moved in *B. R.* for a prohibition, on a suggestion that it was a mere temporal offence since the 7 and 8 Will. III. c. 35; and it was granted.

The plaintiffs accordingly declared in prohibition; and the declaration set forth the articles exhibited against them in the spiritual court; and then continued to set it out, first the law, that no person shall marry without banns or licence, &c. and 2dly, the fact, that they were married without banns or licence by such a person in his own house between the hours of one and eight in the afternoon. They further declared that the stat. 7 and 8 Will. III. c. 35, inflicts the penalty of £10 upon every person married without licence, &c. and that the lay persons of this realm are not punishable by the canons and constitutions ecclesiastical: and that is a mere temporal offence, punishable only by the statute. To this the defendant demurs, and prays a consultation.

Dr. Andrews,

Dr. *Andrews*, from Doctors Commons, for the defendant. That the ecclesiastical law of *England* is like the other parts, both written and unwritten, and that many parts of the ecclesiastical jurisdiction exercised in this realm, as the power of ordinaries, their jurisdiction over churchwardens, parish clerks, &c. arise from the unwritten law; so that, though there were no constitutions giving the ecclesiastical court the cognizance of marriage, it were sufficient that they claim it by immemorial usage.

That as to what is laid down in general terms in the declaration, that the laity are not punishable by any canons ecclesiastical, it is contrary to 25 *Hen.* [VIII.] c. 19, which makes the canons then received in *England* part of the general law of this realm.

There are two points principally in question; 1st, Whether clandestine marriages are punishable by the common law; 2dly, Whether the canons relating to clandestine marriages extend to the laity.

As to the first, there are many canons to that purpose. In the 4th book of the decretals of the council of *Lateran*, tit. 4, chap. *de clandest. desponsione*, and *Hard.* 101, it is held, that the constitutions of the council of *Lateran* are general laws received in *England*, and as forcible as an act of parliament. *Vaugh.* 199, 132, has the same determination. And the council of *Oxford*, held 1322; *Linw. de sponsalibus*, confirms the council of *Lateran*. A constitution made 1328, *Linw. tot. 1. de clandest. despons.* punishes marriages. Another C— *de humanâ concupiscentiâ*, tot. 1, book 4, and 2d book of decrees, cause 30, \*ques. 5, chap. 2. *Roll's Abr.* title *Bastard*, *Foxcroft's case*†, it is said that the issue of a clandestine marriage was adjudged a bastard; so that formerly the canons were more strictly observed in *England*, than they are now by the temporal or ecclesiastical courts. 2 and 3 *Edw.* VI. c. 21, 5 and 6 *Edw.* VI. c. 12, take notice of these canons. The 101, 102, 103, 104, of the canons made and passed in the convocation 1603, and confirmed by the King's letters patent, are all against these marriages in their several points. In the Rubrick of the common prayer book, which is confirmed by act of parliament, it is said that marriages shall be openly solemnized in the church; and marriages are there said to be spiritual.

The next question is, whether canons made in the convocation bind the laity.

The old canons received in *England* as the law of this nation are ratified by 25 *Hen.* VIII. c. 19. And it is said in 4 *Coke Inst.* 223, that this statute is not introductory of a new law, but only declaratory of the ancient common law.

The convocation claims an immemorial right to make canons obliging all people. In the 150th canon, made 1603, it is said to be an error to hold that no person is bound by the canons, but who are assembled in convocation.

Ecclesiastical

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[ \*58 ]

† 1 *Rel. Abr.* 359, *see vide* the case.

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Ecclesiastical punishments have been inflicted upon lay persons in many instances for clandestine marriages.

In the year 1598, Sir *Edward Coke*, then attorney-general, married the Lady *Hatton* according to the book of common prayer, but without banns or licence, and in a private house; several gentlemen were then present, as Lord *Burleigh*, &c. They all, by their proctor, submitted to the censure of the archbishop, who granted them an absolution from the excommunication they had incurred by the act of absolution sets forth, that it was granted by reason of their penitence, and the fact seeming to have been done through ignorance of the law. This may be seen in the *Regist. Whitgift*, fo. 108, *Collier's Church Hist.* 102†.

The next was in 1601, when two persons were enjoined to do penance in the church upon their knees for marrying without banns or licence. *Regist. 3. Whitgift*, 126. In 1603, there was an absolution given to two persons on this account. *Regist. 1. Abbot*, 160, and many other cases.

Many authorities there are at common law which shew that the laity are bound by the canons.

The case of *Bird and Smith, Moor*, 781; on a question in relation to the power of the canons, there was a meeting of the lord chancellor, the two chief justices, and the chief baron, and it was by them resolved, that the canons of the church of *England* made by the bishops and convocation, and confirmed by the king, though not ratified by act of parliament, as firmly bind the whole realm in ecclesiastical matters as an act of parliament.

*Hill and Good, Vaugh.* 327; a prosecution was commenced in the ecclesiastical court against a person for marrying his wife's sister; a prohibition went, \*but a consultation was prayed and granted; and it is there said, that if by the canons a marriage be declared to be against God's law, we must admit it to be so, for that a lawful canon is as much a law as an act of parliament, or any part of the law, for the law *non recipit majus et minus*, *Mittingley and Martyn, Jones (Will.)* 257. The plaintiffs were cited for living together as husband and wife without having solemnized their marriage, and on their application for a prohibition it was held, that persons living together as husband and wife without being known to be married, or persons marrying without banns or licence, are citable into the ecclesiastical court. *Edes and Bishop of Oxford, Vaugh.* 18, 21.

2 *Fent.* 44. It is Mr. Justice *Faughan's* opinion, that the canon of 1603, though not confirmed by parliament, yet being confirmed by the king, sufficiently bind the laity; and it is there, also, held that a person might be prosecuted in the ecclesiastical court for keeping a conventicle (before the toleration) notwithstanding the temporal punishment inflicted by statute, since they were *directe intuitu*.

2 L

† N. B. Lord Chancellor *Egerton* submitted to the censure of the archbishop on the same account.

2 *Lev.* 222. That though the statute inflicts a penalty for teaching school without licence, yet the spiritual court may proceed to punish by the canons†.

Indeed in 12 *Rep.* 72, the convocation case, it is laid down, that the convocation may make constitutions to bind the spirituality, but not the laity; but then there is an exception in the end as to spiritual persons and spiritual things: and this is said to be taken from the power of *Leed's* case, 20 *Hen.* VI. c. 13, from which no conclusion can be drawn; it is indeed said that the convocation cannot bind the temporality, but by that must be understood, temporal matters, and not temporal persons, for the party there was a spiritual person. The same case in *Brook*, title *Ordinary*.

As rectors are the guides of their parishes in spiritual matters, and they choose their procurators for the convocation, it cannot be said but that the whole kingdom have their representatives in that assembly; for none but freeholders have such an estate, choose members of parliament, and yet they are looked on as representatives of the nation.

As to the remaining point, whether the stat. 7 & 8 *Will.* III. c. 35, by inflicting a temporal punishment, has taken away the ecclesiastical jurisdiction, there being no saving clause in the act.

The title of the statute is an act to enforce the laws now in being against clandestine marriages: now there were then no laws in being against the persons married, but ecclesiastical laws. Indeed the act 6 & 7 *Will.* III. c. 6, inflicts upon clergymen marrying without licence the penalty of £100, but that was only for the better securing the stamp-duty; and an enforcing act can never be interpreted to destroy the thing it was intended to enforce.

In the stat. 10 *Ann.* c. 19, concerning clandestine marriages, there is a strong clause saving all ecclesiastical jurisdiction; which must have been upon a presumption that the ecclesiastical laws relating to this point were still in force, otherwise it were saving a thing not in being, if the spiritual jurisdiction was taken away by the former act.

\* Acts of parliament ought to receive such an interpretation as will more effectually enforce the remedy, and prevent the mischief; but to say that the act *Will.* III. took away all ecclesiastical jurisdiction, in this case will have the contrary effect, as there would be no punishment left for persons marrying in a private house and out of canonical hours, provided they had a licence.

The ecclesiastical and temporal courts have often a concurrent jurisdiction; and there the sentence of one court will bar proceedings in the other; but here they do not in the least affect one another, they being for distinct ends; the prosecution in the spiritual court being *pro salute animæ*, and that in the King's court, for temporal satisfaction.

In the case of adultery, a person may be sued at common law for damages, and for penance in the spiritual court: so, for laying violent

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[ \*60 ]

† In the case of *Dodderidge* and *Rand* a prohibition granted, *Hil.* 7 *Geo.* II.

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violent hands on a clerk, a person may be indicted at common law for breach of the peace, and fined; and yet be excommunicated the ecclesiastical court, the punishments being *diverso intuitu*. As likewise in the case of usury, 1 *Lev.* [138] *Slader and Sma broke*, the ecclesiastical court was allowed to proceed and deprive a pretended clergyman, who had forged orders, after he had been convicted and punished for the forgery at common law. *Hill and Gomer, Jones, (Tho.)* 162, is indeed contrary, but submitted which is the most reasonable determination. *Savill v. Kirri* 1716, 10 *Mod.* 384, a person sued for defamation in the spiritual court, moved for a prohibition, because the plaintiff had recovered damages in the king's court, but denied, because the prosecution were for different ends. 4 *Coke*, 20. *Latch*, 244. *Hob.* 187.

Where the statutes do not intend there should be double penalties, there is often an express clause to that purpose, as in 4 *Jac.* c. 15, against drunkenness, 3 *Jac.* I., against recusants.

In the case of *Crow and Dickman*, in *C. B.* 1716, it was the opinion of the Lord King, that the want of saving clauses does not take away the jurisdiction of the spiritual court.

That the declaration is ill, it being set forth, that the statute was made the 22d November, in the 7 & 8 years of *Will.* III. which impossible: had it been said, an act made in the parliament hold in the 7 & 8 *Will.* III. it might have been good. This was determined, *Moore*, 203, in debt on the statute of *Edw.* VI. for trel damages in not setting forth tithes; the declaration recited an act made on such a day in the 2 & 3 of *Edw.* VI. and judgment was arrested, because one day could not be in both years.

*Mr. Clive*, for the plaintiffs. That the 62d canon made in 1603 says only, that no minister shall marry without licence, on banns nor privately: and all the rest of the canons are made in consequence of this, with reference only to clergymen, that the constitution *de humanâ concupisc.* extends only to the clergy. *Linw.* 14 *Gloss.* it is said that words *hujusmodi intercessantes* mean only of clergymen.

[ \*61 ]

\*In *Salk.* 672, it is said that the king's consent makes a canon binding to the clergy, but not to the laity. In *Brook*, tit. *Ornary*, pl. 1, and 20 *Hen.* VI. c. 13. 21 *Edw.* IV. c. 47, it is said that the convocation is spiritual, and so are all its constitutions.

*Hale's History of the Law*, 27. That all the strength the canons have obtained in this kingdom, proceeds from their having been received by consent of parliament, or from immemorial use or custom; whereas the canons of 1603, have neither of the sanctions.

That the provision of the act of 25 *Hen.* VIII. c. 19, was never duly fulfilled, for that gave a personal power to *Hen.* VIII. to constitute thirty-two persons with a power to choose a body of canons out of those then in force, which should be binding to the whole realm; which power was never duly executed. The said power was given by 3 & 4 *Edw.* VI. to that king, but his des

also rendered it ineffectual. And *Gibson* in his *Codex* says, that a body of canons was prepared, but that he died before he gave his assent. The same power was given to Queen *Eliz.* but it slept during her life, and has never since been revived.

As to the 2d point. That the stat. 7 & 8 *Will. III. c. 35*, is a general law, and is made without any saving clause to the ecclesiastical jurisdiction; and in 1 *Inst.* 96. 6, it is laid down as a maxim in law, that where the common or statute law gives a remedy in *foro seculari*, (whether the matter be spiritual or temporal) the cognizance of that cause belongs to the king's temporal courts only, unless the jurisdiction of the ecclesiastical court be saved or allowed by the same statute.

There are several authorities to shew that an action for the same thing will not lie in both courts, *Salk.* 552. *Farres.* 78. 2 *Inst.* 487. 2 *Roll's Abr.* 295, pl. 3. If a person is cited in the spiritual court for calling a woman a whore within the city of *London*, as it is there actionable, a prohibition always goes. It is allowed indeed that the ecclesiastical court may proceed to deprive for an offence punishable at common law, but not to punish. *Jones (Tho.)* 131. *Carth.* 464. *Grant's case.* 11 *Rep.* 2 *Inst.* 659. *Hard.* 116, and the case of *Slader and Smallbroke*, [1 *Lev.* 138] cited by the other side.

As the act 7 & 8 *Will. III.* has inflicted a punishment for the very same act as they would prosecute for in the spiritual court, the rule will hold good to prohibit them in this as well as other cases, *nemo debet bis puniri pro eodem delicto*. Stand over.

\*See the court's opinion given by Lord *Hardwicke*, C. J. in this case, *Mich. 9 Geo. II. (1.)*

(1) *Post*, 326.

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[ \*62 ]

### SMITH and BOUCHER and Others.

2 *Bernard. B. R.* 331. 2 *Stra.* 993. 2 *Kel.* 144. pl. 123. [*Ridgw.* 4, 136. *Cun.* 89. 127, *post*, 69. *S. C.*]

IN an action for assault, battery and false imprisonment, [against] Dr. *Boucher* (plaintiff in an action in the vice-chancellor's court of the university of *Oxford* against the present plaintiff) the vice-chancellor, beadles and gaoler of the county gaol of *Oxford*; the defendants jointly pleaded Not guilty as to the assault and battery, and as to the imprisonment (which was for eight days) they justify that it was by due process of the chancellor's court, and then

Where in a justification of imprisonment under process of the vice-court of the chancellor of *Oxford*, the defendants set out a custom for the plaintiff in that court to make oath, that he has

a personal action against the defendant, and that the plaintiff believes the defendant will run away, upon which oath being made the judge may grant a warrant, such custom was held not supported by an affidavit stating that the plaintiff suspects the defendant will run away. If a plea be ill as to one, it is ill as to all.

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set out that the university of *Oxford* had been a body politic tim out of mind; and that *Hen. VIII.* by his charter had ratified thei customs, and confirmed to them the power of holding a court ever *Friday* before the chancellor, his commissary or deputy, with juris diction in all actions personal, where one of the parties is of th university; and that these letters patent were confirmed by statut 13 *Eliz.* (1), and then they set out the particular customs of th court as confirmed by the charter; that [on] an affidavit made b the plaintiff of the damages sustained, and that he believes the de fendant will not come in on the summons, but rather attempt to g out of the jurisdiction, the court will oblige the defendant to put i bail, or send him to the prison; and then brings his own case to th custom. The plaintiff replied that no affidavit was filed of th *quantum* of the debt according to the statute. The defendant de murred to the application. The plaintiff joined in demurrer; b on the argument gives up the defence of his replication, and take exceptions to the defendant's plea.

Mr. *Strange*, for the plaintiff; that the exceptions they take t the defendant's plea arise from two points:

That first, The custom therein set forth is itself bad; 2dly That though it be good, yet the defendants have not pursued th custom in this case.

As to the custom itself: the first objection is, that it is set fort to be the custom, that the plaintiff make oath only that he has a action personal, whereas it should have been that he has cause o action in order to have made it a good custom, for a man may bring an action without cause for it.

[ \*63 ]

\*2dly. That it puts the plaintiff to swear the law, which oath i never admitted; for he is to swear that what is the foundation of hi suit is in point of law a personal action; which every man cannot tell, who has not had an education in the law.

3dly. That the plaintiff's oath settles the sum for which bail shal be put in; though it may be allowed in contracts, yet is never al lowed in actions for words, as this was, but is always left to th discretion of the Judges.

4thly. That according to this custom the defendant is held t bail, if the plaintiff does but swear he believes it is his intetion t withdraw, which is not positive and full enough to give sufficien reason for depriving any man of his liberty.

5thly. That the custom here set out leaves it in the power of th vice-chancellor to proceed either by the law of *England*, or b the statute of the university: so that if the common law makes fo the defendant, he is at liberty to proceed against him according t the statutes, if these are less favourable to him: and *e contra* whereas all other counts have some settled rules to go by, som fixed law whereby they are bound.

As to the second point, that allowing the custom to be good, th defendant has not acted in pursuance to the custom.

1st. B

1st. By the custom, as it is set out, the oath must be made before the chancellor, his commissary or deputy; by which must be understood the deputy of the chancellor: whereas the party here made oath before the commissary's deputy; and it is a rule in law that there can be no deputy of a deputy.

2dly. That it is the custom that the plaintiff should swear he *believes* the defendant intends to withdraw; whereas in this case it is only set forth, that the plaintiff swore he *suspected* he would withdraw; which does not in the least come up to what is required; as a thing may be a very good ground for suspicion, and yet not strong enough whereon to found a belief.

3dly. That it is said only, that he was damaged by the words spoken to a thousand pounds, according to his estimation; whereas the custom set out requires that he positively swear the damage.

4thly. That the plea only sets forth that he was sworn of and upon the truth of the premises, which a man may be, and yet *swear* in the negative. This has been several times determined; as in the case of *The Queen and Green, Gilb. Cas. 132. Fortesc. Rep. 203. 10 Mod. 213*, a conviction for selling bread contrary to the assise, and was quashed, because it only set forth that the evidence swore *de et super veritate premissorum* (1.) In the case of *The Queen and Gery, Pasch. 3 Ann.* was the same determination. *Gilb. Cas. 244, 245.*

5thly. The custom is, that the court be held every *Friday*, whereas it is said in the plea that the present plaintiff was arrested by process dated the 7th of *August*, 1731, which, upon looking into the calendar, appears to have been on a *Saturday*; and the court in a question of this nature is obliged to take notice of the calendar. *Salk. 626.* And in the case of *Hoyle and Cornwallis, Trin. 6 Geo. I.* on a writ of error. Part of the process was set out to have issue on the 6th of *June*, which, on looking on the calendar, appeared to be on a *Sunday*, and thereupon the judgment was reversed. *Stra. 387. Fortesc. Rep. 373.*

6thly. It is not set forth that the then plaintiff was within the jurisdiction and precincts of the university.

So that the custom not being pursued, the proceedings against the now plaintiff are void.

That the defendants having all joined in the same plea, they have made their case the same; and if the plea is ill as to one it is ill to all. *Ollyett and Bessey, cited 2 Lut. 937, [2 Sir T. Jones, 214.]* and in the case of *Philips and Biron and another, Hil. 8 Geo. I. B. R. Stra. 509.* In an action for false imprisonment against a person suing out a *capias ad satisfac.* and the officer that executed it; the defendants justified on a judgment afterwards set aside for irregularity, and it was held no justification to the party suing out the judgment, for that he could not take advantage of his own irregularity: but it had been a justification to the officer had he not joined in the plea, because he could not know but it was regularly signed; but

(1) But see 1 *Salk. 369. pl. 1*, where it was held sufficient.

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but that the officer having joined with the other defendant in his justification, he had lost the advantage of it. 1 *Saun.* 28, to the same purpose, and 1 *Lev.* 95 (1), *contra*.

Serjeant *Skinner*, for the defendants :

That these have immemorially been the customs of the university, and that great respect has been paid to them by the law since the earliest times, as appears by 9 *Hen. VI.* c. 44. *Litt. Rep.* 40 1 *Mod.* 163, *Magdalen* college case, it is said that the privileges of \*the university are good whether confirmed by statute or not : but the charters of the universities by letters patent under the great seal stand confirmed by the stat. 13 *Eliz.* c. 29, as fully as if they were recited *verbatim* in the act ; and in *Litt. Rep.* 9, there is the opinion of *Hale*, C. J. to the same effect.

As to the first objection to the custom, that he only swears he has an action personal, it is just the same as if he had sworn he had a cause of action.

That by the words, the chancellor, his commissary or deputy, it has been always the custom of the university for the vice-chancellor when he goes out of the university to leave a deputy in his room.

As to the objection that the plaintiff's oath makes him judge in his own cause, as it tends to settle the sum for bail, these words are added in the plea, submitting it nevertheless to the discretion of the judge ; and this is no more than what is done by every plaintiff.

That indeed bad customs cannot be ratified and confirmed by parliament ; but that a custom is not bad for differing from the common law, for they are as much the law of the places wherein they are observed as the general usage is the law of the whole realm. There are many particular customs operating strongly against the common law : an instance of one is in *Cro. Car.* 259 where it is said that in some parts of *Wales* there are trials by only six jurors, and that such usage is confirmed by 9 *Hen. VIII.* † and where a custom was alledged that an infant above the age of fifteen years might make a feoffment of his lands, and the custom was held good (2).

That the oath taken of and upon the truth of the premises in manner aforesaid is equally strong, as if the words of the plea relating thereto had been repeated.

As to swearing the damages according to his estimation, had he sworn never so positively, it must have been according to his own estimation.

† Such usage is not good where it is 564. *Cro. Car.* 259. 1 *Sid.* 233. [3 *K.* not confirmed by statute. *Roll's Abr.* 58 ; but see stat. 3 *Geo. II.* c. 25. s. 2

(1) But see this last case.

(2) In the former edition, *Cro. Jac.* and the numerous authorities there cited. *Com. Dig.* title *Infant*, (B. 6. reference does not appear ; for the point,

see *Moor.* 512. *Rob. on Gavelkind*, 128

As to the day of holding the court, it is not said that the vice-chancellor held the court the 7th of *August*, but that he granted his warrant that day, which might be done out of court.

It is said in the plea that the defendant came and made his complaint before the vice-chancellor according to the custom; which sufficiently expresses that it was within the precincts, or it could not have been according to the custom.

\*That a strong suspicion is a ground for belief.

That this plea ought to be favoured, as there is no precedent for pleading this way to be found in the books, nor any cause wherein the jurisdiction of the university has been principally brought in question.

But that there still remains another question, whether or no an action of false imprisonment will lie against a judge making a mistake in any thing under his jurisdiction; and in the case of *Gwime* and *Poole*, 2 *Lut.* 1560, it is the opinion of Mr. Justice *Powell*, that an action of false imprisonment will not lie in that case, either against the judge, officers or party; and he likewise adds that there is no authority in the books to warrant such an action against a judge for what he does judicially, where he does not know that the matter arises out of his jurisdiction; and that there is no difference in this case between a judge of an inferior and superior court. 26 *Edw.* III. c. 16. 1 *Lev.* 95. It is said that where a judgment is set aside for irregularity, though it may lie against the party, yet it will not against the officer.

Mr. *Strange*, in reply. That as to the customs of the university being confirmed by act of parliament, it is agreed, that if they are bad in themselves no act of parliament can confirm them; and though the customs of the city of *London* had been confirmed by act of parliament, yet many of them had been set aside as bad.

Hereupon the Lord *Hardwicke*, C. J. took notice that many customs had been allowed in *London* which would not have been allowed good in any other place.

*Curia.* Lord *Hardwicke*, C. J. That all the exceptions relate to two general points: 1st. To the custom; and 2dly. Whether the defendants have brought their cases within the custom.

That the privileges of the universities will and ought to be supported by the courts of justice, though they cannot be supported any further than they are consonant to law; but that in the present case there was no reason to give any judgment which may tend to weaken their privileges; for it will wholly turn upon the second point, whether or no the defendants by their plea have brought themselves within the custom.

As to the custom of swearing that the plaintiff has an action, it must be understood the same as a cause of action, it being before the commencement of the action itself, and is agreeable to *Justinian's* definition of an action; *jus prosequendi in judicio quod agi debetur*.

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All inferior courts before the last act used to require special bail in all cases, by reason of the limitation of their jurisdiction, lest the defendant should withdraw himself from them, therefore the custom requiring oath to be made of the sum due, and of the plaintiff's believing the defendant is about to withdraw himself, are in favour of the defendants.

Indeed a void custom cannot be confirmed by act of parliament but the custom of proceeding either by the law of *England*, or the statutes of the university, must be taken distributively when the statutes give a remedy.

Nothing is more certain than that the king cannot by virtue of his letters patent erect a court to proceed according to the rules of the civil law, or a new court of equity: but the letters patent here mentioned are set forth to be expressly ratified by act of parliament, so that the custom is well set out.

But the great difficulty is as to the 2d point: though the rule of the common law is, that a deputy cannot make a deputy, yet a commissary may have a deputy, as in proceedings in the ecclesiastical courts we take notice that the commissaries have surrogates.

That there is little in the objection to the plaintiff's swearing the damages according to his own estimation, for he could not possibly swear otherwise; nor is there any more in that of the court being to be held every *Friday*; for it is not set forth to be the custom that this warrant be granted in court.

But the two objections which stick principally, and to which no sufficient answer has been given, are these:

First, That the plaintiff does not according to the custom swear he *believes* the defendant was about to withdraw, but only that he *suspects* it; and if an affidavit should be read in the court, wherein a man swears he suspects something, we should not take it to be equally strong as where he swears he believes it.

The next strong objection is, that he only swears *of and upon the truth of the premises*; which has often been determined to be insufficient: and the reason given is good, that a man may swear in that manner, and yet swear in the negative. It is necessary that the evidence be set out particularly in the manner it is sworn, as to the words, in the manner aforesaid, they seem therefore to refer to words intervening in the plea; so that the court is of opinion that the defendants have not brought their case within the custom.

The next consideration is, whether any of the defendants can justify themselves; and as to that the law according to the case cited, that had they severed in plea each man might have stood upon the merits of his own case; but as they have joined in the plea, they must stand or fall together, as they have put themselves upon the same defence.

The only remaining doubt, if any, is, whether an action of false imprisonment will lie against any of the defendants for what they have done; the consideration here will be how far it comes within the reason of Mr. Justice *Powell's* determination in the case *Guin*

*Gwinne* and *Poole* before cited. And it does seem to be distinguishable from that; for in that case there is a supposition that the judge only makes a mistake in a matter under his jurisdiction, which is not the case here: for in the present case the vice-chancellor is a judge claiming a jurisdiction under a custom, and therefore must be conusant of that custom; and so it should seem that if he acts in a case not brought within the custom, he must be supposed to act knowingly where he has no jurisdiction, and to be a wilful trespasser. It seems likewise that the party, who prosecutes his action in a jurisdiction wherein it does not arise, may be liable to an action of false imprisonment; and if this action will lie against either judge or party, it will lie against all the defendants, as they have made the same defence.

*Lee*, J. further took notice of a case mentioned in *Hob.* 63, where an inferior court entitled themselves to make out precepts directed to their officers; and in an action of false imprisonment the officer justified under a parol precept; but it was adjudged, that the custom to make out precepts must be understood of precepts in writing, and that therefore the justification of the officer under a parol precept was ill, and all proceedings thereon void; and that consequently the action did lie. Now in the present case, as there was no power to arrest but by the custom, and as the custom was not pursued, all that is done should be accordingly void.

But as this seemed a matter of consequence, the court ordered it to be argued again as to this single point, how far it is or is not distinguishable from the case of *Gwinne* and *Poole*, 2 *Lut.* 1560. Stands over.

Determined, judgment for the plaintiff, *Michaelmas*, 8 *Geo.* II. 1734.

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## MICHAELMAS TERM,

8 Geo. II. 1734. B. R.

PHILIP Lord HARDWICKE, Lord Chief Justice.  
 Sir FRANCIS PAGE, Knt.  
 Sir EDMUND PROBYN, Knt. } Justices.  
 WILLIAM LEE, Esq.  
 JOHN WILLES, Esq. Attorney-general.  
 DUDLEY RYDER, Esq. Solicitor-general.

SMITH *versus* BOUCHER and Al<sup>s</sup>.*Ante*, 62. 2 Str. 993, S. C.

Although a court have original jurisdiction of a cause, yet if it award process, which it hath no jurisdiction to award, an action for false imprisonment lies against the judge and officers.

But if the judge have a jurisdiction to do an act, and he do it mistakenly, no action will lie.

ON an action of trespass and false imprisonment against Dr. Boucher, (plaintiff in an action in the chancellor's court of the university of *Oxford*, against the present plaintiff) and against the vice-chancellor, beadles and gaoler of that university; the defendants all joined in their plea and justified under process out of the chancellor's court of *Oxford*: and then set forth the custom of that court. It was adjudged upon the last argument that the defendants had not brought their case within the custom.

It was then ordered to stand over as to this one single point, viz. How far it was distinguishable from the case of *Gwinne* and *Pook*, 2 *Lut.* 1560, where it is the opinion of Mr. Justice *Powell*, that if a judge makes a mistake in a thing under his jurisdiction, an action of false imprisonment will not lie against the judge, party, or officer (1.)

Mr. *Dennison*, for the defendants: That it is laid down in the case of *Gwinne* and *Poole*, [2 *Lut.* 1560] that an action of false imprisonment will not lie either against party, judge or officer, if the judge have jurisdiction \*of the cause, though he proceed *inverso ordine* or erroneously; and in the present case there is no doubt but that the vice-chancellor had jurisdiction of the cause, since

[ \*70 ]

(1) See the note, (1), *post*.

since it is well set forth in the plea to be an action personal, and arising within the jurisdiction of the university.

It is next to be considered whether this act is extrajudicial and void, or only erroneous. The courts of common law are equally confined by the rules of that law, as this court is by the custom; and yet though their process should be apparently illegal, an action of false imprisonment will not lie against the judge.

10 *Rep.* 76. The case of the *Marshalsea*, it is laid down that where a court has jurisdiction of a cause, though they award erroneous process, as a *capias* against a peer of the realm, though the same appear upon the writ, yet an action of false imprisonment will not lie upon it (1).

As to the case in *Hob.* 63, where a court entitled themselves to make out precepts, and the officer in false imprisonment justified under a parol precept; which was adjudged not to be within the custom, and therefore the proceeding thereon void, and the action did lie. The court there had no jurisdiction to award such process (2.)

The case of *Rycraft and Calcroft*, *Hil.* 1 *Geo.* II. *C. B. Fortesc. Rep.* 344, an action of trespass and false imprisonment was brought against one of the deputies of the corporation court of *Grantham*; the defendant justified under process of that court; the plaintiff replied that affidavit was not made of the sum due according to the statute†; upon demurrer his replication was adjudged ill, and that the action would not lie in this case.

Mr. *Draper*, for the plaintiff. That the action is proper, and the only proper one that could be brought. The distinguishing rule where actions on the case, or actions of trespass, are to be brought is this, where a fact is injurious in itself an action of trespass is to be brought; where it is injurious only in its consequences, an action on the case. See *Fortesc. Rep.* 212. 2 *Raym.* 1399. 8 *Mod.* 272. *Stra.* 634. If a person puts his cattle into a common where he has no right, it is tortious; and trespass will lie against him by the lord of the common; but the commoners cannot maintain trespass against him, but they may have cause if there is not common sufficient for their own cattle. So if a person surcharges a common, the commoner may have ease, but not trespass against him; in the present case the warrant of arrest is in itself injurious (3.)

\*That this case is easily distinguishable from that of *Gwinne and Poole*, for here the vice-chancellor had no foundation in law whatever

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12 *Geo.* c. 29, perpetuated by 21 *Geo.* II. c. 3; [see also 51 *Geo.* III. c. 124. s. 1.]

(1) See note (1), p. 71, *post*.

(2) For this, in the former edition, see 2 *Lord Raymond*, 1399; *Bayley's* edition; also 1 *Chitty on Pleading*, *Lev.* 203 was cited; but erroneously. 125 to 128, and index.

(3) For the learning upon this ques-

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whatever to award this process, and therefore it must be void. That there is a plain distinction between process that issues erroneously; and process that issues without any foundation.

In the case from *Hob.* 63, the court had jurisdiction of the cause, but they awarded bad process, and therefore false imprisonment lay.

In the case of *Philips and Biron*, *Hil.* 8 *Geo.* I. [1 *Str.* 509,] stated on the former argument, it was determined, that in false imprisonment the party cannot justify the taking in execution on a judgment set aside for irregularity, though the officer may.

The plaintiff in an execution justifying imprisonment must set out the judgment, for if there is no judgment the execution is without foundation: but the officer need not do it as he acts only under the execution.

As to the case of *Rycraft and Calcroft*, the making affidavit of the sum due is a matter collateral to the jurisdiction, and founded on a directory act of parliament; besides, the act does not say that the process shall be void for want of it.

Lord *Hardwicke*, C. J. and *cur'*. The authority of the case in *Hob.* 63, over-rules all that was principally insisted on concerning the court's having jurisdiction of the cause: for that case proves, that though the court has original jurisdiction of the cause, yet the want of jurisdiction to award the process that they do award subjects the judge and officer to an action of false imprisonment (1). In the present case the custom of making oath is set out as a condition precedent to granting of process, and this not being performed, the proceedings are entirely void.

An action was brought against *Howell*, recorder of *London*, for having set a fine upon a juryman for a verdict against evidence. The defendant justified under a commission of *oyer* and *terminer*, and the special matter. The plaintiff replied that the verdict was not against evidence; to which the defendant demurred; and the court were of opinion that as the defendant had a jurisdiction to fine as a judge of *oyer* and *terminer*, supposing he had made a mistake, as it was in a thing under his jurisdiction, the action would not lie. 2 *Mod.* 218, *Hamond* and *Howell* (2).

\*Judgment must be given for the plaintiff generally, *Jones (Thomas)* 13, against all the defendants, for as they had all joined in the same plea, there was no need of giving a distinct opinion as to the action lying against the officer, &c. for the plea is no justification either to the party to the suit, or to the judge, who must be supposed consant of his own jurisdiction.

Judgment for the plaintiff (3.)

N. B.

(1) So an action on the case may be maintained against a judge of the ecclesiastical court, who excommunicates a party for refusing to obey an order which the court has not authority to make, or where the party has not been previously served with a citation or monition, nor had due notice of the order. 3 *Campb.* C. N. P. 388. See also a report of the trial at length, published by the plaintiff.

(2) See also 1 *Salk.* 397. 1 *Comp.* 172. 1 *T. R.* 493, and *id.* 538.

(3) As to parties having a justification.

*N. B.* There may be a custom to award process by parol. In the sheriff's court of *London*, there is no other process (1).

tion, joining with those who have not, losing the effect of their justification, see 2 *Str.* 1184; see also 2 *Bl.* 845.

The same case, as reported 3 *Str.* 993 is confined to the single question, whether this justification were well or ill; whereas there appear upon the present report several *dicta obiter* that question. In the same case, as reported, *Can.* 127, the Lord Chief Justice, with respect to whether some of these parties, as the officer or gaoler, might not have sepa-

ately justified under the process of the court, is said to have expressed an opinion contrary to that here reported, and in 2 *Wils.* 385, the court made a *quære* as to the apparent *dictum*, that in the present case the officer and gaoler might have justified separately, for none could have justified the whole proceedings, they being *coram non judice*, and a mere nullity. See 2 *Str.* 711, 1002.

(1) *Com. Dig.* title Courts, (O. 4.) *Prio. Lond.* 271, 272, 277.

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### BERN and BERN.

A WRIT of dower was brought in *C. B. of Ireland*. As to of premises in the count, the tenant pleaded *ne unque seisi que dower*. Issue upon this, and a verdict for the demandant; judgment upon it, *et tenens in misericordia*. As to the residue of the land contained in the count, the tenant pleaded that the husband being an infant at the time of the marriage, there was a discourse between him and the demandant's father, she being likewise an infant, about the marriage, and that it was agreed between them, that when the demandant's husband should come of age, he should settle a rent-charge of such a value upon the demandant in lieu of her dower, and that when he came of age he made such settlement accordingly. To this there was a demurrer, but before judgment given upon it one *William Sinclair* came in according to the statute of *Gloucester*, and is received *pro interesse suo*, and pleads that the grandfather of the demandant's husband being seised in fee of the lands in question made a lease of them to his ancestor for the term of ninety-nine years, part of which term is unexpired; and the demandant comes in and confesses that this *William Sinclair* is entitled to the term. Then there is judgment for the demandant on the demurrer *et quod tenens sit in misericordia*: upon that judgment is given to deliver seisin of the premises to the demandant, but that execution stay till expiration of the said term. Upon error in *B. R.* in *Ireland* judgment was affirmed. Error brought in *B. R.* on both judgments.

Judgment for the demandant in dower allowed to be amended after error brought, by striking out one of two averments inserted therein.

Mr. *Parker*, for the plaintiff in error: That the judgment is erroneous; 1. Among others is demanded a messuage or workhouse; that this is wholly uncertain, equally with the words *messuage or tenement*, which has been determined bad (2); and things ought

(2) See 2 *Str.* 934, and the cases there mentioned. *Id.* 991. 1 *East. R.* 441. 44, n. 3. 1 *T. R.* 11, *contra*; and see 2 *Saund.*



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ought to be set forth with certainty in dower as well as in ejectment. A seisin is to be given on one as well as possession in the other.

\*2. That the plea is a good bar, as it is said that a jointure was made in satisfaction of dower.

3. That there is a mistake in the *scire facias* issuing out of *R. in Ireland*, it being made returnable at a day certain; that it is a miscontinuance not aided by verdict according to the statute *jeofails*, since it is subsequent to it, 1 *Inst.* 335, where one process is awarded instead of another, or when a day is given which is not legal, it is a miscontinuance. *Sid.* 306. 1 *Vent.* 7. That this fault of the *scire facias* is not cured by appearance.

4. That there are two amerciaments of the tenant, whereas it ought not to have been punished the last time, it being for no fault of his, but on the receipt of tenant for years.

*Contra, Strange.* That as to the 1st objection, the reason why messuage or tenement has been held bad is because of the uncertainty of the last word, which takes in corporeal and incorporeal inheritances; and therefore tithes, &c. which are tenements, cannot be called messuages. Messuage or house would be good; and here the last word workhouse is a more particular description of what was before called a messuage.

2d Objection: this bar cannot be good; 1st, because the original agreement was not in writing, and therefore void by the statute of frauds; and 2dly, because the husband was an infant, and therefore his assent not binding to him.

As to the objection to the *scire facias*, it is to be understood only as a process to bring in the plaintiff to assign his errors, and his coming in upon it had cured the fault. 1 *Inst.* 325.

As to the two amerciaments, the stat. 16 and 17 *Car. II. c. 8* enacts, that no judgment after verdict, &c. shall be reversed for want of a *misericordia*, or *capiatur*; and that all defects of a like nature shall be amended in the court where error is brought: that in the last general words this fault is included.

Lord Hardwicke, C. J. That the court must take notice of the court of *C. B. in Ireland* proceeding by original: and it is certain that where process in the original action is returnable at a common return day, so must likewise the process upon a writ of error. But the stat. 32 *Hen. VIII. c. 30*, says, that no judgment shall be stayed by reason of any discontinuance after verdict, which words have been extended in some cases to discontinuances made after verdict. That the only doubt is relating to the two amerciaments. At common law, before the stat. 16 and 17 *Car. II. c. 8* if an amerciament was entered instead of a *capiatur*, though it was for the benefit of the defendant, yet, as it was the judgment of the court, he might assign that for error himself. Here is a consideration of law, though we know in fact that it comes to nothing.

But at length the court ordered it to be amended upon the statute, and the first *misericordia* to be struck out; and it stood up.

[ \*74 ]

upon the paper, without requiring a distinct motion for that purpose.

Judgment affirmed (1.)

(1) So also the want of a *capiatur*, or is aided by the statutes of jeofails, of the substitution of one for the other, 16 and 17 Car. II. c. 8. 4 Ann. c. 16. s. 2.

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### THE KING and BROTHERTON.

ARTICLES of the peace were exhibited against the defendant by his wife, and he was bound in £1000 to keep the peace; and his sureties in £500 each.

*Trin. 9 Geo. I.* The Earl of *Stamford*, on his lady's swearing articles of the peace against him, was bound himself in £4000, and his sureties in £2000 (2).

Articles of the peace exhibited by the wife against the husband.

(2) See also 1 T. R. 696.

### LUMLEY and PALMER.

3 Bac. Abr. 611. 2 Str. 1000. [Ridgw. 72, S. C.]

AN action was brought against the defendant as acceptor of an inland bill of exchange. Upon the trial before Lord *Hardwicke* at *Guildhall* it appeared upon the evidence that the acceptance was by parol only. The plaintiff had a verdict, but this point was saved to the defendant, whether or no a parol acceptance of an inland bill of exchange is sufficient to warrant an action against the acceptor upon the stat. 9 & 10 Will. III. c. 17. 4 Ann. c. 9, and it was moved accordingly in *B. R.*

Evidence of a parol acceptance of a bill of exchange is sufficient to charge the drawee as the acceptor.

Mr. *Abney*, for the plaintiff: That this acceptance by parol is good. That the judges have extended actions of bills of exchange in favour of merchants and trade. *Holt*, C. J. said he remembered the first action brought on a bill of exchange. 2 *Lut.* 1585. *Treby*, C. J. said, that bills of exchange were first allowed between *English* and foreign merchants, next among *English* merchants, afterwards among all traders in general, last among all persons whatsoever. 2 *Vent.* 292. If a gentleman draws a bill of exchange, he is a merchant to that purpose.

\* That the two acts concerning inland bills of exchange are made for the benefit of the drawer: that he should not be chargeable for interest and costs without a profit [protest.] *Salk.* 131.

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Acceptance for part is good. *Wetherlock and Keel*, 6 Geo. I. Comb. 452. These resolutions seem to be founded on *Molloy*, who says the same.

Acceptance by a stranger is good so as to bind the stranger for the honour of the drawer.

Acceptance after time of payment is elapsed, is good. *Carth.* 459. *Salk.* [127,] 129.

Though the act 4 and 5 Ann. provides, that no acceptance of an inland bill of exchange shall charge any person whatsoever unless under-written or indorsed, yet the last clause in the act sets all at large again, which is a proviso that nothing contained in this act shall discharge any remedy which any person may have against the drawer, acceptor, or indorsor of any such bill.

Therefore as these acts have made no alteration as to this point, it is to be seen what was the custom of merchants before those statutes, and what it is now.

Molloy, 295, 300. It is said that an acceptance binds without writing, and that a small matter amounts to an acceptance, so as there be an understanding between the parties; that if it is said, leave your bill with me and I will accept it, that is a good acceptance†.

Since these acts the determinations have been with the plaintiff.

Michaelmas, 12 Geo. I. *Wilkinson and Lutwyche*‡, at *Nisi Prius*, before Lord *Raymond*. Action on a foreign bill of exchange against the defendant as acceptor; on the evidence it appeared that the defendant in a letter said, I will pay it if you will first let me send to my correspondent in *Ireland*; it was insisted upon by the defendant that this was only a conditional promise of acceptance; but the chief justice held it a good acceptance.

Michaelmas, 6 Geo. II. *Cox and Coleman*§, a foreign bill of exchange was drawn upon the defendant, and returned and protested for non-acceptance, and afterwards the defendant said to the plaintiff, if the bill comes back I will pay it; and this was held a good acceptance||.

*That there never was any difference between foreign and inland bills of exchange as to the matter of acceptance by common law nor

† 3 Bac. Abr. 610.

‡ 4 Vin. Abr. 250. pl. 12. 3 Bac. Abr. 610. *Str.* 648. S. C.

§ 4 Vin. Abr. 250. pl. 11. 3 Bac. Abr. 610. S. C.

|| Under-writing or indorsing a bill thus, "I will not accept this bill," is held by the custom of merchants a good acceptance (1).

(1) *Contra*, *Peach v. Kay*, *Sittings after Trin. Term*, 1781, *K. B. Bar. Bayl.* 78, n. (a.) It occurred to the editor to omit the foregoing note altogether; but the absurdity, it is to be feared, has taken too deep hold of its

ground to be easily extirpated. It is cited, for the purpose, indeed, of being rebutted, by authors deservedly eminent; and this is an additional reason for its being retained here. *Vide Bar. Bayl.* 78. *Chitty*, 196, 197, n.

nor by statute, but only in matter of protests they differed at common law.

Mr. *Strange*, on the same side: That there is no doubt but before the 9 and 10 *Will. III.* a $\dagger$ parol acceptance was good, as appears by *Molloy*. The alteration which that act has made as to those bills of exchange is, that it makes under-written acceptance necessary to warrant a protest for non-payment, so as to charge the drawer for principal, interest and charges; but the act does not say that an acceptance, though not in writing, shall not be sufficient to any other purpose than that particular one there mentioned.

This act of 9 and 10 *Will. III.* does not extend to protests for non-acceptance, and therefore in order to elude this act it was customary with merchants to refuse to accept. To supply this defect was stat. 3 and 4 *Ann.* made, which gives a protest for non-acceptance; and then provides that no acceptance shall charge the drawer with interest and costs on a protest for non-payment, unless it be under-written or indorsed; and this is all the innovation that is made by the statute, but there is nothing in it concerning an action against the acceptor, but it is made merely for the benefit of the drawer, that he should not be charged with interest and costs upon a parol acceptance. This appears by the last provision in the act, which is, that nothing contained in the act shall discharge any remedy which any person may have against any drawer, acceptor, or indorsor. Now the plaintiff had by the common law a remedy to charge the acceptor for the principal, and that still remains.

That this has been the constant course of the city of *London* ever since this act as well as before.

Scott and *Anderson*, *Michaelmas*, 1 *Geo. II.* A parol acceptance of an inland bill of exchange was held good by *Raymond*, C. J. at *Nisi prius*, *London*.

Mr. *Marsh*, *contra*. That as many inconveniences arose from a slight acceptance of an inland bill of exchange, the design of the above mentioned acts was, that an acceptor should not be made liable but by his solemn act of under-writing or indorsing.

That in the act of *Queen Anne* are these general words, that no acceptance shall be sufficient to charge any person whatsoever except under-written or indorsed.

*That there can be no custom of merchants as to these bills of exchange, since *Holt*, C. J. said, he remembered the first action ever brought on them.

That then it must depend upon the custom as to the acceptance of foreign bills; and in *Lutw.* 887, in a declaration on a foreign bill; when it comes to an averment of the fact it is particularly said, *acceptavit et manu sua subscripsit*.

Reay and *Meggot*, at *Nisi Prius*, in *London*, *Hil. 7 Geo. II.*
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C. B. it was ruled by *Eyre, C. J.* that a parol acceptance of an inland bill was not sufficient to charge the acceptor^(1.)

Mr. Abney, in reply: That according to *Molloy* and the two cases before cited, parol acceptance is sufficient in foreign bills of exchange.

Lord Hardwicke, C. J. That at the trial of the cause he was of opinion that the action might be maintained against the acceptor on a parol acceptance, but that he had saved the point, as it depended upon the penning of two acts, both very dark, but more especially the last, and as it was said to have been otherwise determined by *Eyre, C. J.* (2), but that he was now confirmed in his opinion, and that the true construction of these acts is to charge the drawer with principal and interest after protest; which will appear by considering the purport and intention of them.

That it had been truly said, that before these acts there was no difference between foreign and inland bills of exchange, but in case of protests, for at common law there was no way to charge the drawer of an inland bill with interest and costs after a protest; and therefore the first act was made that after acceptance by under-writing, these bills might be protested for non-payment, and that thereon interest and charges should be paid by the drawer from the time of the protest. The statute does not say the original sum, for that is recoverable without protest; but interest and charges.

Then was made the act of *Queen Anne*, which recites this clause in the act of *King William*, and the mischief to be remedied is said to be that there was no provision by the first act for interest and charges in case any merchant refused to accept the bill by under-writing or indorsing: and this act makes a new provision, and enables them to protest for non-acceptance, so that the whole provision of the two acts plainly relates to protests, the first giving a remedy upon protests for non-payment, and the second protests for non-acceptance.

Indeed, the fifth section has express words that no acceptance shall charge any person whatsoever unless under-written or indorsed; *and if these words stood singly, it would be hard to say that any remedy lay against the acceptor by reason of a parol acceptance: but then the generality of these words is restrained by the words that immediately follow: that if such bill be not accepted by such under-writing or indorsement, no drawer shall be liable to pay costs, damages or interest thereon; so that the first general words are only to be understood to relate to the charging the drawer with interest and costs. Nothing is more common than for an act of parliament to have general words at first, which are afterwards restrained by particular ones.

That it was said that this proviso was put in by the committee, when

(1) See next note.

(2) But this judge afterwards changed his opinion. See post, 278.

when there might not be so much time for drawing it up clearly, as had it been done at the first drawing the act.

The proviso at the end of the act is also very material to the present point, that nothing in the act contained shall discharge any remedy against the drawer, acceptor or indorsor of any such bill. The construction of this clause is, that it relates to the remedy for the principal sum in the bill; for these two acts relate to and make a provision for protests, which are to be followed with interest, damages, and charges upon the drawer; and therefore this is a very natural proviso that this should not extend to discharge any remedy that they might have for the principal sum, though there were no such protest.

The cases of foreign bills of exchange are not much to this purpose, since the present question wholly turns upon the act of parliament.

The case of *Scott and Anderson* (1) is indeed in point; and that seems to have been the opinion of Lord *Raymond* at the latter end of his time.

The same was likewise the opinion of Lord *Parker*.

Holdsworth and *Thicary*, *Pasch.* 11 *Ann. B. R.* An action on the case on an inland bill of exchange against the acceptor: at the trial exception was taken that the acceptance was only by parol. *Parker*, C. J. held that it was sufficient, for that the acts only extended to the loss of interest and damages by reason of not accepting by under-writing, but not to the principal sum on the bill.

Smith and Plunkett, *Michaelmas*, 11 *Ann. B. R.* the same determination on the same objection.

His Lordship added, that this point did not seem to be so settled to the contrary in *C. B.* as had been maintained at the bar; *for that [so] he had been informed by one of the judges of that court on a late case which came before them, viz. *Orm and Holliday*, *Hil.* 3 *Geo. II.*; an action on the case against the acceptor of a bill of exchange; exception was made at the first trial, that the acceptance was not in writing, and therefore not binding. It was moved in court; they being informed that the opinion of Lord *Raymond* was as before cited, all inclined to the same opinion. Indeed no final judgment was given, because the defendant thought fit to acquiesce in the inclination of the court, and never moved it again.

The new trial denied (2.)

(1) Cited *arguendo*, p. 76, *ante*.

(2) *Acc. post.* 278. *Holt*, 297. The Lords *Kenyon* and *Ellenborough*, C. J. J. also *Luxence*, J. while they assented to the letter of these decisions, which seem to have been founded upon evidence of the usage, appear to have questioned their justness. See 1 *East*.

R. 103. 4 *East. R.* 67. 6 *Ves. jun.* 9. *Bar. Bayl.* 79. *Chitty*, 189. But an inland bill cannot be protested for non-payment, so as to charge the drawer with interest, damages, and costs, unless it has been accepted in writing, 9 & 10 *Will. III. c. 17. s. 1.* 3 *Bac. Abr.* 611. *Bar. Bayl.* 119, n. (a.)

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THE KING *and* READING.*Andr. Rep.* 10. 2 *Sess. Cas.* 286. *pl.* 175:

The testimony of the wife alone cannot, in order to bastardize her child, be received, as evidence of the non-access of her husband; but, after non-access is otherwise proved, her testimony will, *ex necessitate*, be evidence as to the putative father.

The sessions, by an order, stated the special circumstances, and adjourned the farther consideration of a case before them; and, another sessions, by a second order, proceeded to adjudication: held, that a regular continuance was not necessary to appear upon the face of the second order.

The validity of a previous order of two justices, held so far to depend upon the special facts stated in a subsequent order of sessions, that if these be insufficient to maintain the adjudication of the sessions, the order of the two justices, as well as that of the sessions, will be quashed.

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SERJEANT Wright moved to quash an order of two justices, and two orders of sessions made thereon, whereby the defendant was adjudged father of a bastard child.

The first order of sessions was a special order setting forth the particular circumstances of the case, and charging the defendant upon the oath of a feme covert with getting a bastard upon her. This order adjourned the matter to take the advice of the judges of assize, but they declined giving their opinion in it: and the second order resumes the affair, and adjudges the defendant to be the father of the child. There were other witnesses which said that the husband was resident about seven miles from the wife's habitation.

Exception was taken to these orders, that the wife is the only evidence; and that she is not a competent witness in law to exonerate her husband of the charge and burthen of this child.

Contra, Mr. *Abney*, for the orders: That if the orders of sessions on which the fact is stated specially should be bad, yet the order of the two justices is general and good; and therefore though the others should be quashed, yet this will stand.

As to the objection that the wife is not a good evidence at law to prove the defendant father of the child.

Pasch. 3 *Geo. I.* *The inhabitants of St. Andrew's Holborn and of St. Bride's Fleet-street* †: An order of settlement was removed into this court, setting out a special case, that *J. P.*, and *E.* had been *married twenty-three years, and had four children, two of which were dead, and two had gained settlement, both the husband and wife were married to other persons, by their mutual consent, about eighteen years before this dispute arose: the wife after her separation from her husband had eight children; this matter appeared upon the examination and evidence of the wife; and *Parker, C. J.* was of opinion that the wife was a good evidence to prove that the children did not belong to her husband, but to the other person; as they were poor persons, and therefore the child is entitled to a settlement and maintenance somewhere, and it must be indifferent to the parents where, and the woman could have no interest in fixing them upon the other person.

Pendrell and Pendrell, Hil. 5 Geo. II. 2 Stra. 925. 3 Peer. Will. S. C. 276(1), an issue directed out of chancery to try whether the defendant was legitimate or not; on the trial before *Raymond, C. J.* the declaration of the mother‡ was given in evidence to prove the child a bastard.

Hil.

† *Stra.* 51. *Sess. Cas.* 117. *pl.* 113, *Cas. of Set. and Rem.* 102.

‡ *N. B.* In that case the husband was dead. [But see 11 *East. R.* 132.]

Hil. 3 Geo. II. Clark and Wright, C. B. (1), on an issue out of chancery to try the legitimacy of the defendant the frequent declarations of the mother that the child was not her husband's were offered, but because the mother was alive, not admitted; but *Eyre, C. J.* said, that had she herself been there she might have been examined.

Mr. Parker, on the same side; that if the orders of sessions are bad, the order of two justices will stand, for the court will take no consideration of any thing set out upon a bad order; as they take notice of nothing set out in a plea that is bad in any particular. That the first order of sessions as it makes no determination, but only refers the matter, is bad, *Salk.* 486, and that no adjournment appearing upon the face of the first order, the second order was wholly superfluous.

Hil. 7 Geo. II. In the case of *Shrewsbury, 2 Stra.* 975. *2 Barnard. K. B.* 272. [440, 457.] *Ses. Cas.* 253. *pl.* 201. a rate was made for the relief of the poor, an appeal against that rate to the sessions; the sessions adjourning the matter of the appeal from the 19th of the month to the 20th, but as it did not appear upon the face of the order that they likewise adjourned the court till that time, this court were inclined to think it bad till it was set right by another *certiorari*, which returned an adjournment of the court.

Serjeant Wright and *Mr. Strange*, in reply: As to the point chiefly insisted upon, that the orders of sessions are bad, because there is no adjournment, it must be allowed that if an adjournment did not appear upon the face of the order, any act done at an adjourned sessions would not be good: but this is an original sessions; neither *is the first to be called an order, for the matter is by that only referred in order to take the advice of the judges of assize.

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That the sessions is not bound to determine this appeal at the first sessions, but they may at any time put it off in order to hear more evidence, or take the advice of the judges, or for any other cause.

As to the merits of the case, it is held, 1 *Inst.* 6 b. that a woman cannot be an evidence for or against her husband, as it might be a means of great inconvenience, and cause of implacable discord and dissension between the husband and wife. That there can be no case in which the wife's giving evidence is likely to create so much dissension between her and her husband as the present.

That formerly justices of the peace thought they had nothing to do with the children of married women.

Curia. Lord *Hardwicke, C. J.* There are in the present case two questions, one upon the form of the order, and the other upon the merits.

The objection to the form is, that the first order of sessions makes

(1) Not elsewhere mentioned.

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makes no determination, and that the second order is wholly superfluous, as there appears no adjournment upon the first, so that the sessions could resume the consideration of the cause.

Where an appeal is lodged in the sessions it is necessary that they make a direct and final judgment, *Salk.* 480, and they cannot refer it to the judges of assize for their judgment; and the case of *The King and Willey* (1) this term: and therefore had the matter rested upon the first order it would undoubtedly have been bad; but then it cannot be doubted but that they may continue over the determination on the appeal by a proper adjournment, either to take the advice of the judges, or for any other reason.

Therefore the matter rests upon this, that there is upon the first order a reference to the judges of assize for their advice; and no formal adjournment after it. It does not seem that there ever was any determination in this court, that it is necessary for the justices in their quarter-sessions in the execution of any jurisdiction given by statute to make formal and regular continuances, as the courts above do. It must indeed be agreed, that upon indictments where they proceed as a court of record at common law, they must make *regular continuances. But it seems that upon orders no such formal adjournment is necessary; and the matter sufficiently imports that there was in fact an adjournment in the present case by referring it to the judges for their advice when they should come the circuit.

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Then the question will arise, whether the last orders, being adjudged bad upon the merits of the first order, can be abstracted from them and made good. It has always been taken as a rule in this case, that where there is a general order of two justices, good upon the face of it, and the party appeals from it to the sessions, and they make an order specially, stating the case as it appeared upon the evidence before them, the court will take the special case in this last order, to be the foundation upon which the first order by two justices was made; and, therefore, if the evidence set out upon the last order is not sufficient to maintain their judgment thereon, the court will not only quash the last but the first order likewise.

It has been said, that if the orders of sessions should be bad upon any account, the court will not take notice of any thing appearing upon them; but though this is the rule of pleading, yet it does not hold in orders; for in orders of settlement where on appeal from two justices, the sessions state the case specially, and conclude with quashing the order of the two justices; this court will sometimes make use of the fact appearing upon the last order to quash it, and consequently to affirm the order of the two justices.

Then as to the merits: the wife is not a competent evidence in point of law in this case, that is to prove the whole fact; though it seems she may be a competent witness to prove the criminal conversation

(1) Not elsewhere reported.

conversation between the defendant and herself, by reason of the nature of the fact, which is usually carried on with such secrecy, that it will admit of no other evidence; therefore as to the fact of the defendant's conversation with her she may be a good witness; but this is only from the necessity of the thing. But then in the present case it is gone further, for the wife is the only evidence to prove the absence and want of access of her husband, whereas this might be made appear by other witnesses, and therefore the wife shall not be admitted to prove it, since there is no necessity that can justify her being an evidence in this case.

In the case of *Pendrell* before cited, there was the strongest evidence imaginable to prove the want of access of the husband; it was made appear by several of the husband's relations who watched him for that purpose, that he was in *Staffordshire* all the time his wife went with child, and that she resided in *London* the whole time.

*The wife thereupon is not to be admitted an evidence to prove that her husband had no access to her; and the testimony of the other witnesses that he resided about seven miles off shews an apparent possibility of access (1).

It must be of very dangerous consequence to lay it down in general, that a wife should be a sufficient sole evidence to bastardize her child, and to discharge her husband of the burthen of his maintenance.

But the opinion the court is of at present will not be a precedent to determine any other case wherein there are other sufficient witnesses as to the want of access: but the foundation that is now gone upon is the wife's being the sole witness (2.)

Page, J. That this is something similar to the cases of hue and cry, where by statute in an action against the hundred, the person robbed is admitted an evidence from the necessity of the thing as to those matters which generally can be proved by none but himself, as that he is robbed, and of what sum, and in what place; but of all other things which may possibly be proved as well by other evidence, he is no witness in law, nor does the statute extend to it, as whether the place is within the hundred, &c.

Probyn, J. In cases of violence committed by the husband against the wife, she herself is admitted an evidence, as in the case of *Lord Audley*†, and in the cases of exhibiting articles of the peace, from the necessity of the thing, since it may be done at a time when no one else can prove and know it.

Lee, J. That in the case in *Salk*. [112, pl. 5.] where a child born in

† *Hut.* 115.

(1) But yet non-access may be collected from circumstances, 4 T. R. 356.

(2) See *Peak*. 200, and *Rex v. Inhabitants of Kea*, 11 East. R. 132, where

it was holden, that a woman was equally inadmissible to prove the non-access after her husband's death, as in his life-time.

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in lawful wedlock was proved to be a bastard, no such exception was taken as in the present case, but the defendant merely insisted upon the old notion of the husband's being within the four seas (1.)

That on the stat. 3 Hen. VII. c. 2, in the case of *Ramsay*, on an indictment for forcibly taking away a woman, and marrying her, the wife was admitted an evidence, because none else except the defendant were present (2); and therefore it is very proper to admit this woman to prove what was done in secret, and what it cannot be presumed there are other witnesses to prove; but then it must be admitted no further than necessity warrants; and in all other cases the rule of law is to be adhered to.

\*But that he doubted as to the order of sessions being good in form; for the words of the 18 Eliz. [c. 3.] seem to confine that to the next sessions, and if they then and there do nothing, then the act of the two justices is to stand.

At length the court ordered it to stand over as to this single point of which Mr. Justice Lee doubted; but that all the rest were fully determined.

That it having been determined †, that in cases of bastardy where no order has been made by two justices, but where the sessions have gone upon it originally, as they may by 3 Car. c. 4, and make an order that the defendant is not chargeable, and the same matter has been afterwards taken at the next sessions, that the last order might be quashed because the sessions were before *functi officio*: it might be worthy of consideration on the next argument whether the two justices and the sessions having both made orders are not *functi officio*, and consequently whether the court can bind over the defendant to appear before them again. Stands over (3.)

† Cro. Car. 470. [See also 3 T. R. 496.]

(1) Non-access may be proved though both husband and wife are *intra quatuor maria*; *Stra.* 925; and an order of filiation made thereupon; *Stra.* 1076.

(2) See also *Hale* P. C. 301, 302, 660, 661. *Rex v. Perry*, cited *Bristol Gaol Delivery*, 1794; cited 1 *Hawkins*, P. C. 312.

(3) No further report of this case appears. It is cited *Const.* 445, 5th edition. See also 8 *East*. R. 196, where n. (a), the learned editor observes, that *Ford's M.S.* states the facts thus: "John Alman was husband of Mary Alman, and leaving her upon the 25th of May, 1731, had no access to her from that time till the 25th May, 1733,

upon which day she was delivered of a bastard child, begotten by the defendant Reading, all which was proved by the evidence of Mary Alman. There were other witnesses who proved that the husband was within seven miles of his wife during that time." See also 11 *East*. 132, where it was held that a woman cannot give evidence of the non-access of her husband to bastardise her issue, though he be dead at the time of her examination as a witness; and therefore an order of sessions, stated by that court, to be founded in part upon evidence given to her testimony of that fact, was quashed, and where also the authority of this case was recognized.

HILARY

## HILARY TERM,

8 Geo. II. 1734. B. R.

PHILIP Lord HARDWICKE, Lord Chief Justice.

Sir FRANCIS PAGE, Knt.

Sir EDMUND PROBYN, Knt. } Justices.

WILLIAM LEE, Esq.

JOHN WILLES, Esq. Attorney-general.

DUDLEY RYDER, Esq. Solicitor-general.

### BOUCHER *versus* LAWSON.

*Post*, 194, S. C. 2 Kel. 115, pl. 127. S. C. but not S. P.

AN action on the case brought against the defendant, for that the plaintiff delivered a parcel of goods into a ship, whereof the defendant was owner, bound from the river *Tagus* to *London*, where the goods were to be delivered; and, that the defendant undertook to carry the goods and deliver them at *London* to the plaintiff; the plaintiff averred, that the ship did arrive safe at *London*, and that the defendant refused to deliver the goods to him. The defendant pleaded not guilty. On a trial at *Guildhall*, before Lord *Hardwicke*, a special verdict was found as follows:

That the defendant was sole owner of the ship; that he appointed one *Fletcher* master of it; that the plaintiff put the goods on board this ship to be carried from the river *Tagus* to *London*. And the bill of lading was found in *hæc verba*, whereby the plaintiff was to pay so much freight for the goods, and that the goods were to be delivered at the port of *London* on the 9th of *August*, damages of the sea excepted; which bill of lading was signed by the master.

Although it appear that the freight of certain goods shipped on board a general ship usually belongs to the master, yet if he refuse to deliver the same to the consignee, an action for non-delivery lies against the owners on the general custom, and this, although the master do not account to them for the freight.

But then in the case of a special verdict, it must be found that the ship was a general ship; i. e.

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carrying for hire; for the custom need not be alleged in the declaration: facts must be found sufficient to bring the case within the custom.

The plaintiff in a hard action will not after verdict be permitted to discontinue.

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They further find that the ship did arrive safe at *London*; that the plaintiff has made no assignment of the goods. That in *September* the plaintiff made a demand of them, and that the defendant refused to deliver them, and that the plaintiff was ready to pay the defendant the freight. They further find that the goods were *Portugal* gold, and that to export it is an unlawful trade according to the laws of *Portugal*. They, lastly, find it to be usual when any gold is exported from *Portugal* to this kingdom, for the master of the vessel to take the whole freight to his own use, without accounting for any part of it to his owners, unless there be some special agreement between them to the contrary, and that in the present case there was no such special agreement.

Serjeant *Darnel*, for the plaintiff. That this does not differ from the common case of owners of ships, who in like manner as carriers are liable for the master's neglect in respect of freight.

*Mors* and *Sluce*, 1 *Mod.* 85. 2 *Lev.* 69. 1 *Vent.* 190, 238. [S.C.] An action against the master of a ship for damage the plaintiff has received by his negligence; it was strongly insisted upon, that the action did not lie against the master, but should have been brought against the owners, themselves. But the court held the action lay either against the owner, or master, for that they were both entitled to an action for the freight. The defendant in that case pleaded, that eleven armed men came on board him under pretence of pressing, and took away the gold; but this defence was not allowed of, the court comparing it to the case of a common carrier.

*Boson* and *Sandford*, *Carth.* 58. 2 *Salk.* 440. 3 *Lev.* 268 *Comb.* 116. 1 *Show.* 29. [S.C.] An action against the owners adjudged that the action did lie against, either, owner, or master for default of the master; for either of them may bring an action for the freight (1).

*Brandon* and *Peacock*, the sittings after *Easter* term, 1730 3 *Geo.* II. at *Guildhall*, before *Raymond*, C. J. (2). A person put tobacco on board a ship; the master run away with the ship and tobacco, the goods being insured, the person that owned the tobacco applied to the insurance office and received the value of it. The insurance-office took an authority from him to sue the owner, and the C. J. held that the action lay.

This has been likewise the practice of chancery. 2 *Vern.* 441 A man had undertaken to carry goods in a lighter, and the lighter was overset and the goods damaged, and a bill was exhibited to discover the owners. *Morse* and *Buckworth*, in the same book, 443.

Abne.

(1) Although the point was admitted in the case here cited, yet the decision of the case, by reason of a defect in parties against whom the action was brought, was against the plaintiff on the trial: but now that defect is on available by abatement.

(2) Cited 89. 197. 199, post. C. 145, S. C.

*Abney, contra*, for defendant. That without impeaching any of the other cases, the present may be distinguished from them. The verdict has found among other things that this trade of exporting gold is an illicit trade according to the laws of the kingdom of *Portugal*; and in this particular trade it is usual for the masters to take the whole freight to their own use, without there is some special agreement to the contrary, and that here there is no such agreement.

*Michaelmas*, 13 Geo. I. *Canc. Burroughs and Jamineau* †(1), a suit was commenced at *Leghorn* about the acceptance of a bill of exchange drawn there; and the judges of the court were of opinion that the acceptance was not sufficient: the parties afterwards happening to come into *England*, the plaintiff brought his action here; but the defendant in whose favour the judgment at *Leghorn* was, brought his bill in chancery. And *King*, Lord Chancellor, was of opinion that the court of *Leghorn* having a general and proper jurisdiction of the cause, their judgment was binding and conclusive to the court here, and thereupon granted a perpetual injunction. His lordship cited a very remarkable case of a person tried in *Portugal* for murder and acquitted, and who coming into *England* was afterwards arraigned at the *Old Bailey*, according to the stat. 28 Hen. VIII. but pleaded his formal acquittal and it was allowed ‡.

If the courts here will take notice of the particular determinations of the courts abroad, they will have more regard to the general law of a country declaring trade unlawful, and not give any countenance to actions brought upon such illicit commerce.

The owner of a ship is to be considered as a general master, and the master as his servant; a master is not answerable for the acts of his servant, but where he acts in execution of any authority given him by the master. *Salk.* 282. *Skin.* 625. [S. C.]

If a servant abuses a distress, he, only, is answerable, *Hard.* 31. My servant sells false stuff without my commanding it; no action lies against me; otherwise if by my commandment.

In the present case there is no privity between the plaintiff and defendant, the defendant is wholly a stranger to the bill of lading which is made between the plaintiff and the master, and the freight, as is found by the verdict, is the master's and not the owners.

\*The usage and custom of merchants, which is part of the general law of *England*, and ought to be taken notice of by the courts of justice, is, that in this case the master of the ship is entitled to the whole freight, and the owners to no part of it. The reason the

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† 12 Vin. Abr. 87, pl. 9. 2 Eq. Cas. and allowed. *Hutchinson's case*, *Show.*  
Abr. 524, pl. 7. Mes. 1. Sel. Chan. Rep. 6. 3 Ke. Rep. 785, pl. 34. 3  
Cas. 69. 2 Str. 733, S. C. Mod. 194. Comb. 120. Tri. at Ni. Pri.  
‡ Acquittal on a trial for murder 231. Theo. Evid. 39.  
abroad pleaded on an arraignment here

(1) Cited *arguendo*, 2 East. 268.

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the court went upon in *Boson and Sandford* (1), and the other cases, was, that the defendants were common carriers of goods for hire, and were intitled to the freight; it is said there, that the action certainly lies against them, as they have all the profits and all the recompence; which is otherwise in the present case: neither are these cases of an unlawful trade.

As hire is the ground of the action on the custom against common carriers, so is freight against the owners of ships. The undertaking is not the undertaking of the owners, but of the master. If the servant of a carrier carry goods without the privity of his master, or his receiving a reward for taking them, the master is not chargeable. *Middleton and Fowler, Salk.* 282. To the same purpose *Pate and West, Trin. 5 Geo. II.*; an action against the *Hampstead* stage coach-man for a shirt that was lost, *Raym. C. J.* held, that a servant by taking the profits, or by a special undertaking was liable, but that the master was not answerable where he did not receive the profits.

Serjeant *Darnel*, in reply. That this cannot be distinguished from the case of *Boson and Sandford* (2), for the very bills of lading give the owners an action for the freight. That this being an unlawful trade in the kingdom of *Portugal*, it can have no relation to the contract between the owner and merchant. If a man should steal goods and put them on board a vessel, there is no doubt but the owner would be entitled to freight. As to the master's not being liable for his servant but in the exercise of his trade: this is in the master's trade, for it is the trade of the owners's ships to carry goods. If a servant nails a horse the master is liable: A delivery to the servant in the way his master employs him is delivery to the master. *Palm.* 533.

*Cur.* Lord *Hardwicke, C. J.* This case seemed at the trial of very great consequence, as it concerns on the one side, one of the most beneficial branches of the *English* trade, as it relates to the security that persons have in the trusting their gold on board *English* ships; and, on the other side, as it concerned the security of owners of ships that they might not be charged by the default of their masters further than reason requires: but since by an act of parliament made last sessions, 7 *Geo. II. c. 15* (3), owners of ships are liable for goods taken in by their masters without their privity no further than their interest in the ships \*and in the freight, it is not now of so great consequence, as the point of law here brought in question only concerns the parties in this suit, and will not affect any future determinations.

Had this case been directly within the reason of *Boson and Sandford*, or *Mors and Sluce* (4), the special verdict would not have been

(1) Cited p. 86, *ante*.

(2) *Ibid.*

(3) See Commons Journals for the year 1733, page 277. The case referred to by the petition appears clearly to be that of *Boucher v. Lawson*, cited in part 2, chap. 2, sec. 6. The

bill went through both houses without a division. The clauses directing proportional compensation and relief in equity were introduced in the House of Lords. *Abbott, c. 5, s. 2. n. (k.)*

(4) Both cited p. 86, *ante*.

been directed to have been found. These two cases are under the like reason, as is likewise that of *Brandon and Peacock* (1), and therefore must be taken for law not now to be shaken, that where there is a trading ship concerned in a voyage, it must be considered in the nature of a common carrier, and the owners are liable for the negligence or fraud of the masters. These cases depend upon two grounds; 1st, that the owners appoint the masters; and, 2dly, that the freight comes to the owners.

Here it is found by the verdict that the last of these reasons fails, and, therefore, it will stand upon this single ground, that the master being the owners servant, they are liable for his act.

The first difference attempted to be made between this case and the others is, that this trade of exporting gold is found to be a trade prohibited by the laws of the kingdom of *Portugal*. But, though the trade is found to be there unlawful, yet the verdict has not found the consequences of it, whether it might incur the loss of the ship, or a personal penalty on the master only; and I am not satisfied that this will make any difference: the carrying on, indeed, of a trade prohibited by the laws of *England* is of material consequence, and it is said that the parties in that case shall receive no relief, as they are both *participes criminis*, and therefore the law will not give one any remedy against the other. But if it should be laid down, that because goods are prohibited to be exported by the laws of any foreign country from whence they are brought, therefore the parties should have no remedy or action here, it would cut off all benefit of such trade from this kingdom, which would be of very bad consequence to the principal and most beneficial branches of our trade; nor does it ever seem to have been admitted.

The reason gone upon by Lord Chancellor *King*, in the case of *Burroughs and Jamineau* (2), was certainly right, that where any court, whether foreign or domestic, that has the proper jurisdiction of the cases, makes a determination, it is conclusive to all other courts. But I never was satisfied with the chancellor's opinion in granting an injunction upon it; for, if the exception was an exception at common law, therefore the parties should have been dismissed to have taken advantage of it there (3).

\*In the time of *Car. II.* a suit was brought on a contract of marriage, the sentence of the ecclesiastical court at *Turin* was given in evidence and allowed to be conclusive (4).

But though a determination in a particular case may be binding here, yet that will not make the general rule of their laws conclusive in this kingdom, therefore it does not seem that the unlawfulness of this trade in *Portugal*, since it is lawful in *England*, will have any effect on the determination of this case.

The

(1) Also mentioned p. 86, *ante*.

(2) Cited p. 87, *ante*.

(3) This case is cited for this, *arguendo*, 2 *East. R.* 268.

(4) And for the learning further as

to the question of the conclusiveness of foreign judgment, see 1 *Doug.* 1, and the notes; and where n. [2] a reference is particularly made to this case.

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The next distinction made is, that it is found to be usual when any gold is exported from *Portugal* to *London*, that the master should take the freight to his own use without accounting for it to his owners, unless there is some special agreement between them to the contrary. This point, if any, will make the † material difference; but it wants to be a little more cleared up.

The bill of lading is found by the verdict in *hac verba*; and in it are these words, "to pay freight for the said goods:" now, freight being the fruit and earnings of the ship, by the rule of law, belongs to the owners, and the master only entitled to his wages. And, therefore, had it stood on the bill of lading and nothing else, the court would have took it, that the freight belonged to the owners.

But the question is, whether the subsequent finding of this usage will make any difference? now, as to that, the point will be, whether this is to be taken as a strict custom, or for no more than the common practice, and that the owners only make an allowance to the master of this part of the freight, whether that they pay him less wages, or on any other consideration; for then it is only an allowance of part of their profits to the master, and they are notwithstanding liable: and, therefore, if this finding on the usage is to be taken consistently with the bill of lading, and the reward for carrying the gold is freight, and consequently by the rule of law belonging to the owners, they are within the case of *Boson* and *Sandford*(1).

*Page, J.* That as to the finding of the usage, if a common carrier should allow his driver the carriage of some small things as perquisites, the master would without all doubt be still liable, and that is only a private agreement between master and servant, and only a different way of paying his servant's wages.

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\**Lee, J.* was of opinion, that as the owner is in general entitled to the freight for goods imported, it seemed not to be a proper consideration for the court, whether he is so in this particular case; but that they must go on the general notion of the law in these kind of implied contracts on which actions are allowed against carriers and owners of ships.

That as to the trade being prohibited by the laws of *Portugal*, the right of an *English* subject cannot be altered by the general law of any other country, unless there has been a particular determination in his case.

Stands over. *Q. Trin.* 8 & 9 *Geo.* II. (2).

† In *Justin.* Inst. tit. *Exercita Navis*, owners, and one dissents from the voy-  
an action doth not lie against a man age, he shall not be liable afterwards  
as owner, but as he hath the benefit of for a miscarriage, &c. *Comb.* 117, per  
the freight; for when there are several *Holt, C. J.*

(1) Cited p. 86, *ante*.(2) See *post*, 194.

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MARWOOD on the Demise of FENNEL and Al'. *versus* DARREL.

[1 Cum. 149. S. C.]

[N] ejectment a special verdict was found at [the] Kent [Assizes] 1 Geo. II. as follows :

That *Thomas Darrel*, seised in fee of the lands in question, did by his will bearing date 1703, devise to *E. W.* and *C. W.* all his lands, tenements, and hereditaments to the use of them, their heirs and assigns for ever, in trust to and for the sole beuefit and behoof of his first and every other son in tail male ; remainder to his brother *Arthur* for life : remainder to his first and every other son in tail male ; and for default of such issue then to the said *E. W.* and *C. W.* all his lands, &c. to have and to hold to the use of them, their heirs and assigns, to and for the only proper use and behoof of the first and eldest son of *John Darrel*, of *Cale-hill*, lawfully begotten or to be begotten, not heir at law, or inheritor of the real estate of his father, and to the third, fourth, fifth, and every other son or sons of the said *John Darrel*, and the heirs males of their bodies, so as such son to whom such use is limited be not heir at law, or inheritor of the real estate of the said *John Darrel* : and if the said *John Darrel* should happen to die leaving but one son, then remainder to the heirs of the body of the testator ; remainder to the heirs of the body of his brother *Arthur* ; remainder over to his sisters, and the heirs of their bodies.

The jury further find the death of *Thomas Darrel*, the testator, without issue, and the entry of his brother *Arthur*, and his death without issue. Then they find the age of the sisters and heirs at law to the testator, and lessors of the plaintiffs in this ejectment ; \*they also find several marriages of them ; then they find that *George Darrel*, the defendant, is the second son of *John Darrel*, of *Cale-hill*, and that he was born in the year 1703, and that he has an elder brother, *Philip Darrel*, now living, and that the said *John Darrel*, the father, is living, and has in all seven sons. They further find the entry of the defendant *George Darrel*, and that he suffered a fine and recovery ; and by an indenture, for that purpose, made particular settlements upon his marriage, and that he had two children by his wife : that he was under the age of eighteen at the death of *Arthur* the brother of the testator, and that he was educated in the popish religion, and never took the oaths, nor subscribed the declaration, and that he was a papist ; that the testator was a papist, that his brother *Arthur* was a papist, that the sisters, lessors of the plaintiff, are papists, two of them nuns professed, that the other two had taken the benefit of legacies left them by this will. They find likewise the ages of the five other sons of *John Darrel*, the father, viz. *John Darrel*, born in 1704, who is a papist ;

Under a devise to trustees to their use, to the use of the first and eldest son, not heir at law or inheritor of the real estate of *D* his father, and to the third, fourth, fifth, and every other son of *D*, the second son is described with sufficient certainty, and may take by purchase. But whether the limitation be not void, for the uncertainty who could take in the life-time of *D*, he being found to be living ?

But a papist, under the stat. 10 & 11 Will. III. [now repealed by stat. 18 Geo. III. c. 60 ;] cannot take by will, for a devisee takes by purchase.

But under such devise the legal estate remains in the trustees, and the son of *D* would take only as *cestui que trust*.

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a papist; *James*, in 1706, a papist; *Nat.* in 1709, a papist; *Thomas*, in 1711, a papist; *Josiah*, born in 1713, whose religion is not found. Then they find that the lessors entered and demised to the plaintiff, and that the defendant entered upon and ousted him; but whether the defendant is guilty of a trespass, they submit to the judgment of the court.

The question is, whether the defendant *George Darrel*, second son of *John Darrel*, takes any thing by virtue of this will, or, whether the premises in question are not vested in the heirs at law the testator?

Serjeant *Chapple*, for the plaintiff. That the defendant would take nothing, first, though he were entitled to any thing by the words of the devise, yet he is disabled by 11 & 12 *Will. II. c. 4*, by reason of his being a papist, as it is found in the verdict.

In that act there is a clause which begins in this manner; that after the 29th of *September*, 1700, if any person educated in the popish religion, or professing the same, shall not within six months after he or she shall attain to the age of eighteen years, take the oaths of allegiance and supremacy, and subscribe the declaration every such person shall to him and herself only, and not in respect of his or her heirs or posterity, be disabled and made incapable inheriting or taking by descent, devise, or limitation, in possession, reversion, or remainder, any lands, tenements, &c. and that during the life of such person, or till he or she shall conform, the next relation being a protestant, shall have and enjoy the said lands, &c.

\*That this part of the clause has been determined to relate to devises, &c. made before the statute.

Then follows the remaining part of the clause in these general words:

That after the 10th of *April*, 1700, every papist shall be disabled, and is hereby made incapable to purchase in his or her own name, or under the name of any other, to his or her use, or in trust for him or her, any lands, profits out of lands, tenements, &c. and that all and singular estates, terms, interests or profits whatsoever out of lands after the said 10th of *April*, to be made, suffered or done, to or for the use or behoof of any such person, upon any trust or confidence mediately or immediately to or for the benefit or relief of any such person, shall be utterly void, and of none effect.

That they found themselves upon this latter part of the clause that here being no reference to any particular manner of conveyance, the disabling is general, and extends to purchases of all kinds made to persons within this act. The word *purchase* is a known term in the law, and signifies any estate not cast upon man by act of law. 1 *Inst.* 18.

That this devise will come within that clause as it is found to be made in 1703, which is subsequent to the act.

2dly, That though the defendant were not disabled by act of parliament, yet he could not take under this devise. The word

he claims under are the limitation to the first and eldest son of *John Darrel*, not heir at law to his father; which are wholly uncertain, and therefore void: the father is found to be living, and therefore can have no heir at law at present. Even the eldest son is exempt from that description; *nemo est hæres viventis*.

*Hob. 29.* The father devised, that all his lands should descend to his son, and if his son died without issue male, then to the next heirs male of his own name. The son died without issue male; the testator's brother entered; the daughters of the son brought an ejectment as heirs at law to the testator; and the devise was held void, for that the brother was not heir to the testator since he had grand-daughters by his son.

Serjeant *Eyre*, for the defendant. First, that whatever the defendant's title may be, the lessors of the plaintiff must shew a title in themselves, otherwise they cannot recover. Now, the legal estate is conveyed by virtue of his will to the trustees, the lands being devised to them, to hold to them, to the use of them and their heirs and assigns for ever. The testator's intention of creating a trust appears likewise more plain from the last words of the will: "And also, my will and mind is, that in case my personal estate shall not extend to the payment of my just debts, legacies, and funeral expences, that then my trustees shall, by rents, profits, mortgages, &c. levy and raise such sums of money as shall suffice for that purpose:" which it could not be in the trustees power to do unless the legal estate was vested in them. 2 *Vent.* 311. 1 *Vern.* 415. Words less strong than the present have been adjudged to make a trust in a will.

The consequence of this is, that the trustees who have the legal estate in them, not being lessors of the plaintiff, the plaintiff cannot recover.

As to the objection that the defendant is not so particularly described by the words of this devise, as to take by them; the words are sufficiently certain as to the second, since it is said the eldest shall not be heir at law to his father, and then goes on to the third and fourth son; and it is afterwards said, that if *John Darrel* the father dies leaving only one son, then remainder over, &c.

Though in strictness of law no one can be called heir to his father in his father's life-time, yet the eldest son is usually so called, *Bract. lib.* 285. *Fitz. Abr.* 144, *pl.* 327.

A writ of ravishment of ward, *quare filium hæredem abduxit*, the writ was challenged, because the son could not be heir as his father was living. *Sed non alloc.* 2 *Lec.* 232.

That though the description should not be good as to the second son, yet there can be no doubt as to the subsequent limitations, since they are expressly declared to the 3d, 4th, 5th, and every other son; whereas the father has five, and the youngest (*Josiah*) is not found by the verdict to be a *Roman catholic*.

That 1 *Jac.* l. c. 4, has much the same disabling words, as the clause

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clause of the 11th and 12th *Will.* III. and yet as to that act it was determined, that a person was only disabled as to himself, but that he might take for the benefit of his heirs.

\**Thornby* and *Fleetwood* †, originally commenced in *C. B.* then in *B. R.* where the court was divided, then carried up to the House of Lords, where upon hearing all the judges of *England*, it was determined that the defendant who was a popish gentleman educated abroad should take for the benefit of his posterity; in that case Mr. Justice *Powys* cited the case of *Pye* and *Gorge*, in *Canc.* 1709, where Lord *Comper* held, that upon the first part of the clause of this statute 11 [& 12] *Will.* III. [*c. A.*] the freehold was in *Pye*, though he was not entitled to the profits(1).

That it not appearing that the youngest brother had not conformed, it could not be presumed.

Therefore it is submitted that the defendant is entitled to take for the benefit of his heirs, and though he should not, yet, at least, some of his brothers may take; and though none of them, yet the lessors of the plaintiff have no title.

Serjeant *Chapple*, in reply. That the limitation is to the trustees to the use of them and their heirs to a further use; that if the defendant is not capable, then it will be a resulting trust to the heirs at law, till the next in limitation are capable of taking; but what the plaintiff depends upon, is the last part of the clause, which is not after the manner of the 1 *Jac.* I. *c. 4.* But here a purchase stands singly by itself, and he is absolutely excluded in that case to take either for the benefit of himself or posterity.

That the limitation to the 3d and 4th son, &c. is no better a description, since it is afterwards said, that he shall not be heir at law to his father.

The distinction is, that when an estate vests by descent, it may divest again, but where it vests by purchase, it can never divest again, 1 *Co.* 95. 3 *Co.* 61. *Plow.* 501, 6, and therefore the intent of the testator would be disappointed, if either of the sons that take, should afterwards come to be heir at law to his father.

Lord *Hardwicke*, C. J. That he would give no direct opinion but only break the case.

As to the defendant's title, two points have been made: the first, that the limitation made by the will is not a good limitation, for that the description is so uncertain that the defendant cannot take by it. The second, that supposing the first point to be with the defendant, yet he cannot take as being disabled by the 11 & 12 *Will.* III. *c. 4.*

The

† *Str.* 518. *Com. Rep.* 207, pl. 124. 10 *Mod.* 113. 356. 406.

(1) Probably *S. C. Pr.* in *Ch.* 308. 384; but this point does not appear 1 *Peor. Wms.* 128. 1 *Eq. Ca. Abr.* to be there mentioned.

The first objection seems to have some weight; but it is worthy of consideration, whether this limitation can be reduced to a certainty, for, if the intention of the testator can be found out, the court is obliged to follow it. It seems a natural construction of the words, that he intended the second son should take provided he did not enjoy his father's estate: and the proceeding directly to the third son bears with it a very strong implication that this was his mind; as does also the proviso that he should not be heir at law to his father.

It seems therefore that this first limitation may be made certain to the third son; but if it cannot, if the description of the third son, &c. is certain, it is equally strong and conclusive to the lessors of the plaintiff. The third, fourth, and fifth sons are all first certainly described; and the only thing that can create the least doubt is the subsequent proviso: and it does not seem that the third son, &c. are in any manner within that: so that as at present advised this limitation seems to be sufficiently certain.

Then as to the second question, the case of *Roper and Ratcliffe*† has put an end to that, in which case it was solemnly determined by the House of Lords, that the word *purchase*, in this statute, did comprehend a devise. The construction they made upon this clause of the act was, that all future limitations and devises were within this latter part of the clause, and that a devisee being in strictness of law a person disabled by that clause, was disabled to take by devise.

As to the relation which this bears to the act of the 1 Jac. I. c. 4, there is no such latter clause in that act, as what is depended upon in the present case.

These are the objections to the title of the defendant, but let that be what it will, the lessors of the plaintiff must recover upon their own strength, and if no title is shewn for them they cannot recover.

The great doubt as to their title is this, whether the devise creates an use or trust to the sons of *John Darrel*. And I am clearly of opinion that this is only to the use of the trustees, and that they have a legal estate; and whoever else takes under this devise, takes only as *cestui que trust*.

In answer to this it has been said, that this being a trust for a papist, the estate is made void by the act of parliament. As to this point, it is to be observed, that this is not only a trust for the defendant, but likewise for the other sons of *John Darrel*, the youngest of whom is not found by the verdict to be disabled to take.

It has been the construction of this, that if a trust is for a papist, not only the trust but the legal estate likewise is void, though in the hands of protestants; but then the question is, whether this must not be understood where the whole trust is for the use of papists: and I am at present of opinion, that where there is a remaining

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† 2 Peer. Wms. 5. 9 Mod. 167. Stra. 267.

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maining part of the trust to the use of protestants, the legal estate yet remains in the trustees for that purpose.

The case of *Carrick and Errington*† came in question in Chancery upon this point. A man makes a settlement of his estate to trustees, to the use of the trustees and their heirs in trust for *A* for life; remainder to the trustees to preserve contingent remainders, with remainder to the first and every other son of *A* in tail; remainder to *B* for life; remainder to the sons of *B* in tail. The testator died, *A* the first taker was a papist, but *B* was a protestant, who brings his bill in chancery for the profits of the estate, and makes the heir at law one of the defendants, suggesting that the limitation to *A* was void, he being a papist, and as he had no child, and the next limitation was to him, it was a trust for him. But the Lord Chancellor *Macclesfield*, and afterwards Lord King, upon a re-hearing, were of opinion that the trust to *A* was void, but that the legal estate settled in the trustees still remained good, they being trustees not only for a papist, but likewise for protestants. And they held that trustees for preserving contingent remainders being not only to let the tenant for life receive the profits, but also to make entries, and do all things for the preservation of the estate for persons not yet *in esse*, the legal estate was good in order to preserve these remainders, since the next taker (*viz.* the son of *A*) not being yet *in esse*, it did not appear that he would not be a protestant. And they held that the heir at law was entitled to receive the profits in the meantime during the life of *A* till the next remainder could take effect; afterwards upon appeal to the House of Lords this decree was confirmed.

This is a very strong case to shew that the heirs at law are not entitled to the legal estate, and that the trust being not only for the defendant but also for any other son of *John Darrel*, the younger of them not being found by the verdict to be disabled, and the yet remaining a possibility that *John Darrel*, the father, should be yet living, may have more children, the legal estate still remains in the trustees in trust for these sons.

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\*The consequence of this is, that the lessors of the plaintiff have mistaken their remedy; for, instead of bringing this ejectment they should have applied to Chancery in order to have got the profits from the trustees: and as at present advised it seems that they cannot recover in this ejectment. Stands over (1).

† *Mosely*, 8, pl. 8. 9. *Mod.* 33. 2 *Peer. Wms.* Rep. 361. pl. 104.

(1) No further report of this case to the disability of a papist to take appears. But the stat. 10 & 11 *Will.* under a devise arose, is repealed III. c. 4, upon which the question as statute 18 Geo. III. c. 60.

## EASTER TERM,

8 Geo. II. 1735, B. R.

PHILIP Lord HARDWICKE, Lord Chief Justice.

Sir FRANCIS PAGE, Knt.

Sir EDMUND PROBYN, Knt. } Justices.

WILLIAM LEE, Esq.

JOHN WILLES, Esq. Attorney-General.

DUDLEY RYDER, Esq. Solicitor-General.

### THE KING *versus* ELIZABETH BENN.

**L**ACY moved to discharge the defendant's recognizance under which she was bound to keep the peace for a twelve-month. The time is out this day, the first day of term; then the recognizance, which is conditioned to appear the first day of *Easter* term, and in the mean time to keep the peace, &c. is void.

Lord *Hardwicke*. The time being expired, and no indictment lodged against her, she must be discharged (1).

A recognizance to appear on a certain day, and in the mean time to keep the peace, discharged on the ground that the day had passed, and that no indictment had been lodged.

(1) A motion for a *certiorari* to remove a recognizance of appearance before justices of oyer and terminer, was refused, because, as was said, the court below is most proper to judge upon the whole circumstances of the

case, which are equitably to be considered, whether the recognizance ought to be estreated or not. *Rex v. Combe*, *Hil. 1 Geo. I. cited 4 Hawk. P. C. 148.* marg. 7th edit.

### \*THE KING *and* WHEELER.

[ \*99 ]

[Cm. 155. S. C.]

**FENWICKE.** To shew why a *mandamus* should not go to the defendant as register of the consistory court of *Durham*, to deliver over all the public books, records and entries, to one *Trotter*: it came out on affidavits that *Trotter* had a grant of this office jointly with one *Hilton*, from the late Lord *Crew*, Bishop of *Durham*; and that *Trotter* survived *Hilton*, and by deed poll the 7th of *August*, 1731, he made the defendant his deputy for three years,

Where it appears that the right to exercise a private office is already the subject of a suit in equity between the parties, the court will not interfere by *mandamus*.



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years, which expired on the 7th of *September* last; and that was the ground of *Trotter's* application for this *mandamus*: but it appears now upon affidavits that the parties entered into an agreement in writing under their hands, but not sealed, for *Wheeler's* being his deputy for three years more, and that *Wheeler* has brought a bill in equity for the specific performance thereof, which is now depending in Chancery, and is to be heard next term.

He says these writs are not *ex debito justitiæ*, but at the discretion of the court; and he admits a case cited by Mr. *Parker* upon the motion, where a *mandamus* was granted in the like case to the register of the Bishop of *Hereford*; but that it appeared in that case, that the office had been recovered in an assize; besides, this can have no determination on a *mandamus*, and *Trotter* might have applied to the Bishop's court.

*Strange*, for the *mandamus*, cites 1 *Sid.* 31, a *mandamus* to the town clerk of *Nottingham* to deliver books, &c. to his successor. *The King* and *Powell*, *Michaelmas*, 12 *Geo. I.* *Mandamus* to a former mayor to deliver records, &c. to the succeeding mayor. *The King* and *Wildman*, *Michaelmas*, 4 *Geo. II.* *Mandamus* to the clerk of the Blacksmiths Company to deliver the company's books to his successor. 2 *Str.* 879. *Barnard. B. R.* 402 †.

Lord *Hardwicke*, C. J. The only material thing that has been said for this *mandamus*, is, that *Trotter* appearing to be the legal officer is entitled to this *mandamus ex debito justitiæ*: but I do not see that every officer that is rightfully the officer, though he has been disseised, is entitled to it *ex debito justitiæ*: the reason why we grant these writs is to prevent a failure of justice, and for the execution of the common law, or of some statute, or of the King's charter, and never as a private remedy to the party, except on the statute of Q. *Anne*, (*quer'* if 9 *Anne*, c. 20), and that stands on another footing: nay, the old cases went so far as to refuse a *mandamus* in all \*cases where an assize lay; and though the court is not so strict now a days (1), yet it shews in what light these writs are considered. Now here there don't appear to be any failure of justice (2), but only a dispute about a private right: if you say this is a disseisin, you may bring an assize. In the case of *Vincent*, a *mandamus* was prayed to oblige the Bishop to grant a licence for preaching, to a lecturer; and the court did not enter into the question, whether that were a proper instance of granting a *mandamus*, but

[ \*100 ]

† 3 *Bac. Abr.* [title *Mandamus*, (A.)] *S. C.* but the *mandamus* was denied because they did not produce their charter, or a copy of it, with an affidavit. [For this being a private corporation, they held they could not take notice thereof as they will of a town, &c. without such previous information.]

(1) Though the party had a remedy by assize, yet it is now obsolete. *Bul-  
ler*, J. 1 T. 404.

(2) See *post*, 216.

but refused it because a dispute was then depending, whether *Vincent* was entitled to the lectureship.

*Lee, J.* The having a legal right to this office gives no title to the books, for if *Wheeler* has an equitable right it will bar the legal title; so that in this case how can it be said that *Trotter* is entitled to the books *ex debito justitiæ*. Rule discharged (1).

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The KING  
and  
WHEELER.

(1) The *mandamus* appears to have been refused upon the ground that the application was made pending a suit in equity between the same parties, respecting the exercise of the office sought by the *mandamus*; and the question was not raised as to whether the writ lay in the present case; but

A return to a *mandamus* that a suit

was pending in the ecclesiastical court, was held insufficient, and a peremptory *mandamus* was awarded. Lord *Kenyon*, C. J. 1 T. R. 403, who cites 2 Str. 893-6. Fitzg. 194.

Wherever a party has a specific legal remedy, the court of *K. B.* will refuse to grant a *mandamus*. 1 T. R. 396, 404. See also 1 *Cowp.* 377.

### The PARISHES of CHESHAM in BUCKS and STEPNEY in MIDDLESEX.

*Bur. Set. Cas.* 33, pl. 8. [S. C.]

*DRAPER*, moved to quash an order for removing one *Jackson* and his wife and children, from *Chesham* to *Stepney*: he objects that the justices stile themselves in the order, justices for the county aforesaid, which is quite uncertain, for both *Middlesex* and *Bucks* had been mentioned in the preceding part of the order, so that it does not appear whether they were justices for *Bucks*, which they ought to be, but is quite uncertain. 2dly, That the judgment of the order is not direct, but only by way of recital; "whereas complaint has been made to us justices for the county aforesaid, and we do adjudge," &c.

Adjudication good, though following a recital. Where two counties are previously mentioned "county aforesaid," is bad for uncertainty.

*Pilsworth.* As to the second objection, he submits it upon the words of the order, that it is a plain adjudication. And as to the first objection he says, that unless the court will presume that this order was made by justices of *Middlesex*, it must be of necessity by those of *Bucks*, and the court will not presume they are *Middlesex* justices, but on the contrary, because what has been done, could only be done by justices of *Bucks*; and to that purpose he cites a case of the parishes of *Horsham* and *Henfield*, *Pasc.* 5 *Geo. I.*, where it was uncertain upon the words of the order, which was the parish that made the complaint; but the court held, that it must be intended to have been made by the parish which was aggrieved, and where the paupers were resident, and from whence they were removed.

\*Lord *Hardwicke*, C. J. As to the second objection, though the stile of the order is a little incorrect, yet we should not be too strict in such cases; and the word *adjudge* being here, it is sufficient.

[ \*101 ]

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The PARISHES  
of CHESHAM  
in BUCKS  
and  
STEPNEY in  
MIDDLESEX.

cient. But as to the first objection, that has not been answered and I think it is absolutely uncertain to which county the word *aforesaid* refers; if to the county last before mentioned, that *Middlesex*, and they have no jurisdiction; for the power is only given to the justices for the place whence the person is removed. And this court can intend nothing in this case, but must take the order as it appears; and, it not appearing to be by the justices for *Bucks*, it is a bad order; nor is this case like that quoted by *Mr. Palsworth*; for if that was a complaint by both parishes, it was but of the more weight, or, however, the other parishes joining in the complaint shall not prejudice the complaint of the parish which ought to complain, and did so.

Rule absolute to quash the order.

### GORDON *versus* HALPEN and his WIFE.

[Cm. 157. S. C.]

In an action  
against baron and  
feme, the wife  
cannot have  
leave to plead se-  
parately from her  
husband.

**KETTLEBY** moves that the wife may have leave to plead separately from her husband. The case is, that her estate is settled upon her, which settlement is confirmed by a decree in the House of Lords to be for her separate maintenance; only her estate is made liable to answer all actions brought against her husband on her account: and *Kettleby* suggests that this is a fictitious demand in the plaintiff set up by connivance of the husband, and that he will let judgment go by default, and so share with the plaintiff in what shall be recovered.

Lord *Hardwicke*, C. J. We cannot allow you to sever in pleading (1). Your best way will be to plead in the name of husband and wife, and if the husband should disavow, and that be contrary to the order of the House of Lords, you will know how to enforce that order; but we can do nothing in it.

(1) *Com. Dig. Pleader*, (2 A 3.) *Cro. Jac.* 239, 288, *acc.*

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## ARGLIS and HEASEMAN.

[Cus. 157. 2 Str. 1013. S. C.]

**MARSH** moved to quash an order of sessions, made for discharging an apprentice.

1st Exception. That this is an original application to the sessions, whereas they have no original jurisdiction; their jurisdiction in these \*cases arises from the stat. 5 Eliz. c. 4, sec. 35. And in *Carth.* 198, *The King and Gately*, an order granted for going originally to the sessions; which case is also in 5 *Mod.* 136.

2d Exception. That if the sessions have an original jurisdiction, yet it is limited, upon the appearance of the master, or some default made by him, which ought to be shewn in the order, and nothing of that appears on this order.

3d Exception. That the jurisdiction in this case is not rightly exercised, for the reason they give, and they are bound to give a reason, as for unkind usage from the master; now the act gives them jurisdiction if the master misuse his apprentice or evil intreat him, and the alledging unkind usage comes not up to that: and though the order says further, that the master refuses to continue him in his service, or to entertain him according to the indentures, that will not make it better, for in the case of *The King and Davie*, 2 *Stra.* 704, *Ses. Cas.* 282, *pl.* 221, *Fel.* 225. *Trin.* 12 *Geo. I.* [S. C.] an order stated that the master declared he would not take his apprentice, and held to be no sufficient reason, and the order quashed.

*Pilsworth.* As to the 1st objection, there have been several resolutions contrary to that of *The King and Gately*, and particularly in the case of *The King and Johnson*, 2 *Salk.* 491, it was solemnly settled, that the sessions have original jurisdiction notwithstanding the words of the act. *Stra.* 143. [S. C.] See *Ses. Cas.* 113, *pl.* 109. 2 *Barnard. B. R.* 244, [S. C. *Id.*] 296. 2 *Kel.* 128, *pl.* 104.

As to the 2d objection, he cited the case of *Dillan*, 1 *Salk.* 67, and *Ditton*, 2 *Salk.* 490; but, on looking into them, they appear to be directly against him: and in the case of *Ditton* it is said, that the act must have a reasonable construction so as not to permit the master to take advantage of his own obstinacy.

As to the 3d objection, he says the act leaves it to the justices discretion to discharge if they see cause.

*Lord Hardwicke, C. J.* As to the 1st objection, the later cases have been that the sessions have an original jurisdiction; and though it were to be wished that private justices had prior jurisdiction, as being less expensive; yet I think it is a right determination upon that act, that the sessions have an original jurisdiction;

H

for

The sessions have an original jurisdiction in respect of discharging an apprentice.

But an apprentice cannot be discharged without appearance or summons of the master.

"Using" the apprentice "unkindly" not a sufficient reason for discharging him.

[ \*102 ]

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~  
 ARGLES  
 and  
 HEASEMAN.

[ \*103 ]

for the application, which the act directs to be made to a private justice, seems to mean only to arbitrate and accommodate the dispute. The statute says, if he cannot *compound* the matter, he is to take bond for the parties appearance at the sessions, so that they are not to take it up by appeal (1).

\*As to the 2d objection, I think it is not to be got over. In case of convictions appearance has always been held necessary; but in cases of orders in general, the court in many cases will presume *omnia rite esse acta*, and that distinction between orders and convictions I agree was confirmed in the case of *The King and Lloyd* 2 Stra. 996, 2 Barnard. B. R. 302, [S. C.] Ses. Cas. 233, p. 190, in *Michaelmas* last; but then that presumption is only in case of orders upon statutes which do not in express terms require appearance. But now we are upon an act which gives the justice authority to proceed upon the appearance of the party, so that it is made an essential requisite by the act to found their jurisdiction (2).

As to the 3d exception, in general it is not necessary to set out the reason of their judgment, but here the act requires it; and is rightly said, that using unkindly is not such misusing as is intended by the act: and if the following reason, his refusing to continue him in his service, is to be understood of an absolute refusal to let him continue with him, and not only as a refusal to entertain according to his articles; that neither will be a ground for this order, because the justices have a power to compel the master to take him again, as was done in the case of *The King and Davi* [cited p. 102, ante.]

However this is more doubtful (3); but on the 2d exception the order must be quashed (4).

(1) See *Wms. Saund.* 316, a. n. (4).(2) *Id.* 313, n. (1).(3) *Id.* 313, n. (2). See also *Burn*, title *Apprentices*, sect. 8.(4) This case is cited 1 *Const.* 575.

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## MOORE and ANDERSON.

[Cun. 108, S. C.]

Debt lies in an inferior court upon a judgment in the superior courts.

The distinction between an extent and a *fi. fa.*

*facias* is, that on the *fi. fa.* the sheriff cannot deliver the goods, but must levy, i. e. sell them. On an extent they may be delivered.

SERJEANT *Hawkins*, for plaintiff in error. He speaks only as to the jurisdiction of the court below to hold plea of an action of debt on a judgment in the superior court; and he admits there is a note in 1 *Salk.* 209, that they may; but that the reporter

has made a *quere* at the end: and he cites *Salk.* 499, and 1 *Roll. Rep.* 54, where prohibitions were granted to the inferior courts to stop their proceedings in such actions; and 5 *Mod.* 97, where a judgment in such an action was stayed (1).

*Draper*, for defendant in error.

Lord *Hardwicke*, C. J. I am satisfied that it is impossible to bring a *fieri facias*, which was the process executed in this case, within the meaning of the word *extent*; and this being a private act of parliament, we can take no other notice of it than as it is here pleaded: an extent is a known term. It may issue at the suit of the crown, or of a subject upon a statute merchant, but it has a different effect \*from a *fieri facias*; for on the *fieri facias* the sheriff cannot deliver the goods, but must sell them: and the word *levy*, which is in this act, must mean to levy in the usual manner; so that here is an action brought for a fee, when the act pleaded gives no such fee, and we can take no other notice than as it appears on this record.

Judgment must be reversed.

(1) But see 1 *Sid.* 330, and it seems of record. *Gillb. Debt.* 391, 2. *Com.* that debt lies in the superior courts Dig. title *Debt*, (A. 2.) upon the judgment of an inferior court.

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MOORE  
and  
ANDERSON.

[ \*104 ]

WHITER qui tam and GROOMBRIDGE.

*MARSH*, for defendant, moves to make a rule absolute for plaintiff's attorney to bring in the roll.

*Kettleby*, for plaintiff, produced the roll, which is the *Michaelmas* term last, and offers to give it to the clerk of the papers; but

*Per curiam*, your client must file it himself, for that is bringing it in. Rule absolute (2).

The plaintiff's  
attorney must  
carry in the roll.

(2) See R R. E. 5 *W.* and *M.* sect. 1. M. 9 *W.* III. T. 10 *W.* III. M. 5 *Ann.*, K. B.

STERN and BERN.

*AGAR*. To shew cause why a writ of error brought on a judgment by *cognovit actionem*, contrary to defendant's undertaking, should not be *nonprossed* at the defendant's expence: the cause shewn is, that the contract on which the action was brought was made during defendant's infancy, and the judgment given,

Although an infant agree not to bring a writ of error, it binds him not; but he may assign his infancy for error.

H 2

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STERN  
and  
BARR.

and agreement not to bring writ of error, was during his infancy likewise, and that he intends infancy for error.

*Cur'* on that discharged the rule, for though the judgment binds him, yet it binds but as a judgment reversible.

## STOCKER and HEATH.

That defendant was executor and not administrator, pleadable in abatement only.

*S.C.F. fa. quare executionem non* against defendant as administrator of T. H. Defendant pleads that T. H. made a will, and made him executor and not administrator, but pleads in bar to the action instead of pleading in abatement only; and upon demurrer to the plea, judgment for plaintiff (1).

(1) The defendant might have pleaded *ne unques executor* in bar. *Com. Dig. Pleader*, (2 D. 7.)

[ \*105 ] \*THE KING *versus* The INHABITANTS of ALL SAINTS and ST. MARY's †.

Where it did not appear that any part of the road was in the parish indicted for not repairing it, the indictment was held bad.

So likewise if the breadth does not appear. *Ten men quare.*

THESE parishes are indicted for not repairing the highway, and have demurred to the indictment.

*Marsh*, in behalf of the parishes, takes several exceptions to the indictment :

1st Exception. That there are no names of the grand jurors set out. 2 *Roll. Abr.* 82, and 2 *Keble*, 470. But the indictment being read, it appears their names are set out.

2d Exception. That the indictment is not sufficiently certain in setting out the length and breadth of the road: for it says only, containing by estimation about 16 acres in length, &c. 2 *Roll. Abr.* 81.

3d Exception. That there are three parishes jointly indicted, though it is a separate offence. *Stiles*, 157.

4th Exception. That it does not appear that these parishes are bound to these repairs, for it does not appear that the road is in any of the parishes, nor is there a sufficient prescription laid to charge them otherwise, it being only said that they have used and accustomed to repair.

Lord *Hardwicke*, C. J. I do not see upon this last exception how this indictment can be maintained. The parishes are an ecclesiastical division, yet they are of common right bound to repair the roads, and therefore it is sufficient to shew that a way lies within such

† See 2 *Str.* 1110.

such a parish, and is out of repair, and to pray process against the inhabitants. Now here it appears, that this highway is within the liberty of *Derby*, but it does not that the three parishes are within the liberty of *Derby*; it is only said that they are within *Derby*: and even if these words did sufficiently shew that, yet it would not then appear that they are all within the liberty so as to make them a vill; and if that appeared too, it should be shewn likewise by what means they are chargeable; but it does appear upon this indictment that any part of this road is within the parish; so that it is bad upon this exception.

\**Lee, J.* I am of the same opinion, and I should think too, that the indictment is bad upon the 2d exception, for if the breadth does not appear, how can the court set a proper fine?

All agreed that it is bad on the last exception. Judgment for defendants (1).

(1) See also *post*, 316. 1 *Hawk. P. C.* c. 76, s. 88. 1 *Shorr*, 390, acc. But as the court does not at present estimate the fine from the description of the length and breadth of the road, as stated in the indictment, perhaps the want of stating it would not now be considered as a fatal objection. See 2 *Wms. Sessd.* 158, b. n. (?). And see *Say. N.* 98, 302.

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The KING  
versus  
The INHABITANTS OF ALL  
SAINTS AND ST.  
MARY'S.

[ \*106

### THE KING *versus* NEAL.

INFORMATION *quo warranto* against defendant for exercising the office of master of the Coopers Company; it sets forth that there is a company of coopers, and that the master thereof is an officer of a public trust, and that the defendant took upon him to execute that office, &c.

Defendant has demurred to the information, and there is a joinder in demurrer.

*Bootle*, for defendant, has only this exception, that this is not such a public office for which a *quo warranto* lies.

Lord *Hardwicke, C. J.* But how can we allow of that exception now, since the information lays it to be a public office of trust, which you have confessed by your demurrer. Judgment for the King.

Where in an information against a defendant for exercising an office of trust, it is laid to be a public office, and the defendant demurs, he cannot afterwards object that it is not an office for which *quo warranto* lies.



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STOCK and HUGGENS *and* DE SMITH

[Cnn. 160, S. C.]

If the party bring an action on an award, he is precluded from moving for an attachment for non-performance.

**MARSH.** To shew cause why an attachment should not issue against the defendants for disobeying an award which is made a rule of this court; he says they have liberty by the stat. 9 and 10 *Will. III. c. 15*, which institutes this summary way of enforcing awards, to complain of any undue practice in making the award, any time within the next term after it is made: and in this case one of the arbitrators was not summoned; nor the defendant *Smith* one of the parties.

*Parker* with him. That where an award appears to be unreasonable, though an action of debt may lie upon it, yet the court will not grant an attachment, as was determined in the case of *Wilmot and Allen, Pasc. 4 Geo. II.* Now, here the arbitrators have charged us with the value of the goods when we acted only as factors. He says likewise, and produces an affidavit thereof, that the plaintiff has \*made his election in suing out an action of debt, and is not therefore entitled to an attachment.

[ \*107 ]

*Kettleby.* As to the action of debt which is brought, he says it is as reasonable to grant an attachment notwithstanding, as the several remedies which are allowed upon mortgages, such as a bill for foreclosure, an action upon the bond, and an ejectment to get possession, which are allowed to be all made use of at once. He cites 1 *Salk. 73*; pending an attachment for non-performance of an award, an action of debt was sued, and the court was moved that he might not proceed both ways; and it was likened to the case where the court stays actions on attornies bills, while the matter is under reference before the master: but the court denied the motion, and took this diversity, that where they relieve the party by way of awards in a summary way, as in the instance put, it is reasonable, but otherwise in the case then in question, where the plaintiff has no satisfaction upon the attachment. He also cites *Richardson and Chancey, Michaelmas, 1730*, where plaintiff had judgment in an action of debt upon an award, and the regularity of the judgment being under reference to the master, an attachment was applied for and granted, notwithstanding this objection; however, when the judgment was reported regular, they stopped the attachment.

*Lord Hardwicke, C. J.* I am satisfied you ought not to have an attachment while an action is pending. And this is not like the several remedies allowed on mortgages, for they are for different purposes; as the ejectment to gain the possession of the land, the action on the bond, to recover the money, and the bill is for foreclosing the equity of redemption. They are all remedies which the party

party is entitled to by the course of law, and needs not the leave of the court. Now in this case there are two remedies, one by action, to which you are entitled by course of law, but the other depends upon the discretion of the court; and both are for the very same purpose, viz. for the money awarded; for the court will not deliver the party from attachment till he has paid the money. And the cases cited, are agreeable to this doctrine. For in *Richardson* and *Chancey*, during the stay of his judgment he had lost the fruit of his action. So in the case in *Salk.* 73, no action was depending when the attachment was granted; though in that case I should have thought it considerable, whether, when he had got bail to his action, the court should not have stopped the attachment; but, however, the attachment there was granted before any action brought.

The rule must be discharged (1).

(1) Cited 2 *Tid.* 827. See *Andr.* 299, where the party was put under terms to waive his action. But the motion was refused, although the party agreed to waive the action; having, as the court said, made his election. 1 *Bos.* and *Pul.* 81. See *Andr.* 297, where, by reason of defect appearing on the face of the award, the court refused to grant an attachment.

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HUGGENS  
and  
DE SMITH.

\*KEMPTON on the Demise of BOYFIELD *versus* CROSS. [ \*108 ]

[Cm. 161, S. C.]

[N] ejectment for the rectory of the parish church of *Wandsworth*, tried at the last assizes for *Surry*, plaintiff made title under a term of years from the administrator of *Edward Salway* with the will annexed: but he did not produce in evidence the letters of administration themselves, only an exemplification thereof under the Archbishop's seal, which was in this manner; To all christian people to whom, &c. Greeting: Know ye, that having searched our registers and acts, &c. we have discovered, that on the day of a power was issued to to administer the goods of deceased according to his will, because no executor thereof was appointed; the tenor of which will here follows, (setting out the will *verbatim*). Given under our archiepiscopal seal, &c. Which the judge of assize, Mr. Justice *Reeve*, allowed as good evidence; and a defence was made by defendant, and a verdict for the plaintiff: and now

*Lacy*, for defendant, moves for a new trial, and objects,

1st Objection, That the certificate or exemplification was not sufficient evidence to prove the administration, but that the book wherein those acts were registered ought to have been produced, as in 1 *Lev.* 25; and *S. C.* in 1 *Keb.* 15, *Garret* and *Lister*; and in

Letters of administration with the will annexed, in a cause relating to personal property, prove themselves.

Making a defence on trial in ejectment is a waiver of irregularity in the service of the ejectment.

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in *Peaslie's* case, 1 *Lev.* 101, and 1 *Keb.* 509; whereas this is only a recital of administration in exemplification of a will.

Lord *Hardwicke*, C. J. If it were an exemplification of the letters of administration it would be sufficient.

2d Objection, That the affidavit on which they moved against the casual ejector was upon the late act of parliament, that so much rent was behind, and no distress on the premises; but when they came at the trial they deserted that pretence, and set up another title, which misled us, who were come to make defence on the footing of their affidavit,

*Wynne*, contra.

Lord *Hardwicke*, C. J. The granting administration is the act of the ecclesiastical court, who are the proper judges. The proof of that act is by the commission itself, which can only be denied by denying the seal, or by a copy of the act of court, or by an exemplification \*thereof. So in the court of Chancery and this court, exemplifications under seal are sufficient evidence, as being under the seal of the court, and not like a certificate made by an officer. Now this exemplification does not exactly correspond with the form of exemplifications in this court, for here we set out the record in *hæc verba*, and this is only a recital of the fact; but, however, it imports an *inspeximus*: so that, I think, it will depend on their manner of exemplifying; for if this is their form, I should think, in substance, it is well enough.

As to the other matter, it is matter of irregularity; and it seems to me to be so: but I doubt you have waived it by making a defence at the trial; for if there had been an irregularity in serving the ejectment, or the notice of trial, the making defence would have cured it.

*Page*, J. Doubts if the act intended to bar the plaintiff of making any other title; but suppose it does, yet, that is waived by your defence.

*Probyn*, J. Doubts whether when you have brought this ejectment upon this act of parliament, the defendant need come prepared to make any other defence; for this is a particular sort of ejectment: but then you should have made no defence.

*Lee*, J. I do not see but, notwithstanding the directions of the act, the plaintiff may insist on any other title; but if he does, then he has not made a regular service for such an ejectment; but then, your making defence waives all that: so that I think this should be a motion for irregularity, rather than a new trial. The other matter must depend on the practice of the ecclesiastical court. The cases certainly are, that producing the books, with the entry, is sufficient, without shewing the letters of administration; and this instrument purports an *inspeximus*, and has the credit of the office seal.

*Cur'*: Mention it again, and get some of the registers from Doctors Commons to attend.

Accordingly at another day, several of the people from Doctors Commons

Commons did attend, and were asked, and declared, that the custom was always in the prerogative court in exemplifications of general administrations to set out the letters of administration *in hac verba*; but in case of special administrations, as administrations with the will annexed like this, they recite the entries in their books, and set out the will *verbatim*: and their affidavits to the same purpose were read; and they produced two exemplifications with the will annexed upon the executor's renouncing, which were also in the same form, and one was dated in 1729, and the other in 1732. But Mr. *Rushworth*, \*who was register of the court of Arches, says, their way is to set out *verbatim* whatever is exemplified; but he says they seldom, or ever, have special administrations, and very few others.

So the court thought the evidence was properly allowed at the assizes, and so would not grant a new trial (1).

(1) See *Peak*. Evid. 75. 80.

### BETWEEN the PARISHES of DALHAM and DENHAM.

*Bar. Set. Cas.* 35. *pl.* 11. 2 *Str.* 1004. 2 *Ses. Cas.* 250. *pl.* 271. S. C.

AN order was made for the removal of one *Walker* and his wife from the parish of *Dalham* to the parish of *Denham*, in *Suffolk*, which was confirmed by the sessions; and the case appears upon the order to be, that *Walker* hired a farm in the parish of *Denham*, and paid all rates during his continuance there, which was from the year 1725 to 1730: and that he afterwards hired a farm of £150 *per ann.* in a place called *Southwold Park*, which is an extra-parochial place, consisting of two houses and 500 acres of land, and has no officers for the poor; and the justices adjudge that he could not be removed to that place, and so remove him to the parish of *Denham*, as the place of his last legal settlement.

*Strange*, moved to quash these orders in behalf of the parish of *Denham*, for that it was determined in the case of *Stokelane* and *Dolting*, *Hil.* 11 *Ann. Fortesc. Rep.* 219. fol. 108 (2), that by virtue of the statute of 13 & 14 *Car. II. c. 12. s. 21*, the justices may exercise the powers (of removal) given by the 43 *Eliz.* and that act, in all extra-parochial places containing more houses than one; and the same determination was in the case of *The King and Inhabitants of Rufford*, *Pas.* 8 *Geo. I. Fortesc. Rep.* 321: *Str.* 512: 8 *Mod.* 39. S. C.

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[ \*110 ]

A pauper, whose last residence was in a place extra-parochial, and without officers for the poor, cannot be removed thither, as to the place of his last legal settlement.

The statutes 43 *Eliz. c. 2*, and 13 & 14 *Car. II. c. 12. s. 21*, construed to give the justices powers of removal in all extra-parochial places containing more houses than one, with this restriction, viz. so as such places come under the denomination of a vill: and it must be left to the court to judge upon the circumstances what is meant by a vill.

*Abney*,

(2) 2 *Salk.* 486, marg. S. C.

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 ~~~~~  
 Between the
 Parishes of
 DALHAM
 and
 DENHAM.

Abney, in support of the orders: That in the case of *Stokelane* and *Dolting*, he allows the court did so determine, but not absolutely in all extra-parochial places consisting of more houses than one, but with this restriction, so as to come under the denomination of a vill or township; and in the case of the inhabitants of *Rufford*, the *mandamus* called it a vill, and they returned it to be an extra-parochial place; which return was held bad, because, said the court, there may be 500 houses. He cites a case of *The King* and *The Inhabitants of Belvoir* (1), where it was stated that the extra-parochial place had two houses, the Duke of Rutland's seat, and an ale-house, and the order was quashed as not being a vill.

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Filmer, with him. The definition of a town or vill, according to *Finch*. p. 80, is, containing ten families; according to 1 *Mod.* 78; *it is where there is a tithingman or constable; and according to 1 *Inst.* 115, *villa est ex pluribus mansionibus vicinata et collata ex pluribus vicinis*.

Lord *Hardwicke*, C. J. Before the case of *Stokelane* and *Dolting*, it was generally taken that no settlement could be gained in an extra-parochial place; but in that case the court were all of opinion, that the clause in the statute of *Car.* II., might extend to give the justices power to appoint officers in extra-parochial places, provided it were such a place as could come under the notion of a vill: that construction seems to be a pretty liberal construction of the statute, for, upon reading the clause, it appears to extend only to such vills as are parts of large parishes; but however the court then thought extra-parochial places within the equity of it: and I believe my Lord *Parker* meant by extra-parochial, places consisting of more houses than one, but he added likewise, so as to come under the notion of a vill; so that his meaning was such places as were vills; and I do not see we can call this place a township, or a vill: nor do I know how it can be precisely settled what is a vill, but must be left to the court upon the circumstances of every case; and therefore as this place does not appear to be a vill, I should think the order is right.

Page, J. If this had been a decayed vill, it should be so stated specially.

Probyn, J. The least division that I remember to be known in law is a tithing, which consists of ten houses or families, and how can we understand a vill to be less than that? I think it should rather be understood to be between a tithing and a township. The stat. of *Car.* II., at first related only to the northern counties, and was extended afterwards to other large counties as being within the same equity.

Lee, J. It is now generally settled that justices may appoint overseers in extra parochial places; but that is always on this foundation, that the place must be a town, or a vill. The notion of a vill as a tithing, is a place consisting of ten families; as a civil division,

division, and as having a constable; now here I should not think it necessary upon the statute to be confined to either description; but then it ought, at least, to be a place that has the reputation of a vill; whereas this hath only two houses; so that as it does not appear upon the order, I do not see how we can construe this to be a vill within the statute.

Per cur'. The order is good, so the rule was discharged (1).

(1) See 2 T. R. 207. 3 Burr. 1391. 4 T. R. 550. See also 1 Const. P. L. 1 Bl. R. 419, S. C. 2 Str. 1071. 2 C. 1. s. 7. Cald. 542, S. C. Burr. Sett. Ca. 101, S. C. Cald. 28.

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Between the
Parishes of
DALHAM
and
DENHAM.

*BIDGOOD *and* HAWES.

[*112]

FILMER, moves in ejectment for judgment against the casual ejector, upon an affidavit that the messuage in question being empty and the door shut, one *Brown* did enter thereon, by taking hold of the knocker and standing on the threshold, and being there in possession, did there seal a lease to *Bidgood*; and *Brown* delivered possession by taking hold of the knocker, &c. and *Bidgood* took possession by taking hold of the knocker, &c. and afterwards *Hawes* dispossessed *Bidgood* by taking hold of the knocker, &c. and then the deponent delivered an ejectment to said *Hawes*.

Motion for judgment on an affidavit of the facts attending the sealing a lease on the premises, they being empty, granted.

Cur'. Take your judgment (2).

(2) This remedy is given in cases of vacant possession, by stat. 4 Geo. II.

THE KING *versus* PEMBER.

THE sheriff has returned, upon *mesne* process issuing out of this court, a rescue against the defendant.

Draper, moves he may submit to a small fine, and the court set 1 s. fine on him.

On inquiring about this, Mr. *Waldron*, one of the clerks of the Crown-office, says, that the sheriff's return of a rescue against any one is of itself a conviction of a rescue (3); and process immediately issues from the Crown-office against the rescuer as upon a conviction;

Upon a rescue returned by the sheriff, the court may impose a fine upon the defendant.

(3) Cited 1 Tid. 235.

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conviction; and if it is a false return the remedy is by action against the sheriff for a false return (1).

(1) It is to be presumed this defendant was before the court upon attachment; which may issue on return of rescue by the sheriff, *Dyer*, 212, 2 *Jones*, 39; but, that the return is of itself a conviction, and that process immediately issues from the crown office against the rescuer as upon a conviction, seems questionable. *Com. Dig.* title *Rescues*, (D. 6): for it appears that the party returned as rescuer may traverse the return. *Dyer*, 212, a. See also *Bull. N. P.* 63.

THE KING *versus* NEAL.

A justice of the peace is not bound to hear witnesses on behalf of the party accused, unless he, being summoned, shall attend in person.

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THE court was moved for an information against the defendant, who is a justice of peace, for convicting a man of being the father of a bastard child, the party not being present, nor previously summoned, and the justice refused to hear witnesses who attended on his behalf.

But it appeared to the court that he was summoned; and as to the other matter,

*Lord Hardwicke, C. J. If the party being summoned will not attend himself, there is no reason the justice should hear any defence made for him; for if that were allowed, no offender of this sort would appear, but would, if he found he could not clear himself, run away and leave the parish in the lurch: therefore the justice of peace in this case acted right. And it is but as this court does, when orders of bastardy are removed here by *certiorari*; for we never allow any exceptions to be taken to the order, unless the party attend in person; that the court may take care of him, and make him indemnify the parish if the order is good.

Per Cur. Information denied with costs (2).

(2) But see 1 *Str.* 44. 46, where it was held that the defendant may intrust his defence with another, and that the justices cannot enforce him to appear in person.

THE KING *versus* FRANCIS & AL'.

The Opinion of the Court.

2 *Str.* 1015. *Com. Rep.* 478, pl. 210. [S. C. with the arguments of counsel.] See *Fost. Cr. L.* 128. [*Hale*, P. C. 533. *Hawk. P. C.* 235. *Doug.* 418.]

Taking in the presence of, is a felonious taking from the person; and where the property was taken in the presence of, although not from the person, such presence must be found in the special verdict: but the words, "then and there immediately took," is a not sufficient finding to make it robbery.

If on argument on an indictment for a capital crime, a prisoner appear to have committed a less offence, the court will remand him for the purpose of being tried on a new indictment.

LORD Hardwicke, C. J. Many objections were made to shew that this special verdict was not a charge of robbery; but they have been all over-ruled but one, which was singly to the uncertainty

certainty of the finding, viz. that it does not certainly appear from these words in the special verdict, "that *Core* offering to take the " money up again, the six persons then and there being present, " threatened him if he took it up, to knock out his brains; where- " by *Core* then and there was put in fear, and then and there de- " sisted, and the six persons then and there immediately took it up, " and got on horseback and rode off with it; that the money was " taken up in *Core's* presence," so that the court adjudged it to be a taking from the person: upon this point it has been argued before all the Judges, and my brothers *Carter*, *Comyns*, and *Thompson* doubt, but all the rest are of opinion that this is not a sufficient finding to make it robbery.

Robbery is a felonious taking from the person, putting him in fear, 3 *Inst.* 68, and therefore all the indictments lay a taking *a personâ*, but then the law construes a taking in a man's presence to be taking from the person; so *Stamford*, 27, *a.* and when the taking shall be said to commence is matter of evidence to the jury.

Therefore I would premise that we had no doubt as to the definition of robbery, or of what would be evidence thereof to a jury; but all our doubt was as to the uncertainty of this special verdict.

*The striking of the hand here found, does of itself exclude all force, for it is that he gently struck, and yet if that had been found to have been done *animo furandi*, it would have made the case plain, but for aught appears now, it might be but a simple assault, or an accidental blow, and without intention to make the money fall.

It is found that *Core* was put in fear, and then and there desisted to take up the money; but it does not appear how he desisted, and it might be by going away, &c.

The jurors also find that the six persons then and there immediately took up the money, and got on horse back and rode off, and upon these words our great doubt was; now there is no colour to say that the words then and there can aid any uncertainty therein, for they only relate to the *venue*, and cannot tie up the fact; so then the only material word remaining, is the word *immediately*, and nine of the judges agree that this is of so uncertain a signification, that it cannot warrant the court upon this finding to say that the taking was in *Core's* presence.

It was said that that word excludes all intermediate time and actions; but it will appear that it has not necessarily so strict a signification: *Stevens* in his *Thesaurus* expounds the word, immediate, by *cito et celeriter*; so *Cooper's Dictionary* renders in *English* immediately, forthwith, by and by; and *Minshew* gives it as various meanings, and refers it to the word presently: nor is its signification more confined in legal proceedings, as appears even from 2 *Lev.* 77, in the case of *Pibus* and *Mitford*, which was cited to the contrary, which say thus, though the word immediately, in strictness,

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strictness, excludes all *mesne* time, yet to make good the deeds and intents of parties it shall be construed such convenient time as is reasonably requisite for doing the thing: this word has also been frequently used in special verdicts of murder, as in *Oneby's case*, 2 *Str.* 766. 2 *Lord Raym.* 1485. *Barnard. B. R.* 17. [S C.] [9 *St. Tr.* 14. S. C.] it is used four or five times with different applications; and in the special verdict in *Marbridge's case*, [1] *Kel.* 120, it is twice used in different senses and explained so by other words, as in one place it is said immediately thereupon without intermission drew his sword; and in another place, immediately, in a little space of time between *Marbridge's* drawing his sword, and the giving the mortal wound, &c. Also the stat. of 27 *Eliz. c.* 13. s. 11, enacts that no person robbed shall have an action against the hundred, except he shall, with as much convenient speed as may be, give notice of the robbery to some of the inhabitants of some town near the place; and in all declarations on that statute, the averment of such notice is thus, **quod immediate post feloniam* the plaintiff gave notice, &c. and so are all the precedents in *Coke's Entries*, tit. *Hue and Cry* throughout, which shews that the word immediate there means only with convenient speed, and convenient speed used has accordingly been always allowed to be evidence of that averment, and likewise writs of *habeas corpus* returnable immediate, mean only with as much convenient speed as may be.

And if the meaning of this word is thus unsettled, the court cannot say it absolutely excludes all *mesne* acts, the circumstances here found were certainly probable evidence to the jury to have found that the taking was in *Core's* presence; but if the jury have not found that as a fact, we can make no intendment; but as my Lord *Holt* says, in the case of *The King and Plummer, Keyling*, 111, [also 78,] as the jury have not found that matter, we are confined to what they have found positively, and are not to judge the law upon evidence of a fact, but upon the fact as it is found. And my Lord *Raymond* said to the same purpose in the case of *The King and Huggins*†, that it would be of most dangerous consequence, to leave inferences to be made in case of life by the judges, where the fact was not found‡.

Therefore the prisoners must be acquitted of this indictment.

(1) But we are all of opinion that the prisoners must not be discharged out of custody, because here is plain charge of grand larceny upon them by this verdict; but however we cannot give judgment

† 2 *R. Raym.* 1581. 2 *Str.* 886. ‡ *Barnard. B. R.* 397.
Fitzgib. 187.

(1) It seems to be the taking in the presence, which, had it been proved, would have constituted the capital offence; "but," says *Hawkins*, "he who only attacks me in order to rob me, but does not take my goods into

his possession, though he go so far as to cut off the girdle of my purse, by reason whereof it falls to the ground, is not guilty of robbery." 1 *Hawk. P. C.* 254.

judgment of grand larceny against the prisoners upon this indictment; for though on indictment for burglary and felony the jury may acquit the party of burglary and convict him of felony; or if a person is indicted of felony &c. circumstanced as to exclude him from the benefit of clergy, the jury may acquit of felony to such a value as would forfeit that benefit, and only find him guilty of felony within benefit of the clergy, and judgment may be given accordingly thereupon; yet here the indictment is for robbery *a persona*, and the only doubt referred to the court by the jury is, whether he is guilty of that felony and robbery upon the facts stated by them; but as I say here is a plain charge of grand larceny upon this verdict, the prisoners cannot be discharged, but must be remanded, and then they may be removed by *habeas corpus* to be tried for this grand larceny; and this differs from the case of *The King and Burridge*, 3 *Wil. Rep.* 439. 2 *Ses. Cas.* 264. *pl.* 173, last term, because here is a felony appears plainly upon the verdict, but there no felony appeared.

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The KING
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& AL.

*LOCK and SHERMER.

[*116]

UPON application to stay an action of debt upon bond, upon payment of principal, interest and costs.

Serjeant *Chapple* shews cause, and opposes it unless they pay the costs of a suit in the Exchequer relating to the same matter.

Lord *Hardwicke*, C. J. I believe it has been ruled upon the statute for amendment of the law (1), that they shall do so, and costs in equity relating to suits on bonds have been referred to and taxed by the master. So let the rule be absolute, to stay the proceedings on payment of principal, interest and costs, and of the costs in the Exchequer (2).

Upon motion to stay proceedings upon payment of principal, interest and costs, costs in equity must be included.

(1) 4 *Ann. c.* 16. s. 13.

(2) In 1 *Tid.* 539, is cited 1 *Str.* 696, *contra*. But the plaintiff is not entitled to the costs of a former suit,

wherein the judgment has been reversed on a writ of error, *id.* See also, p. 124, *post*.

JENNINGS and WARNE.

SERJEANT *Belfield* moves to set aside a verdict, because after the jurors were retired, one of them came out from the rest, and spake to the attorney of the other side, and received a bundle of papers from him, which he carried in to the rest.

Where, after the jurors have retired, one of them leaves the room, speaks to the opposite attorney, and without the consent

Fortescue,

of the other side, receives a bundle of papers from such attorney, the verdict will be set aside.

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Fortescue, contra. Alledges that this was nothing more than a map of the premises which the judge had held in his hand all the trial.

Lord Hardwicke, C. J. It will depend only on this, whether it was delivered to the jury by consent of both parties, for if that appeared, it would prevent the parties alledging any thing against it; but as no such consent appears here, the verdict must be set aside

WICKER and NORRIS.

The Opinion of the Court.

Although a particular fact necessary to entitle the plaintiff to recover, do not appear upon the record, yet after verdict, it shall be presumed to have been proved, and the defect shall be cured.

The word "until" is a word of exclusion.

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LORD Hardwicke, C. J. This is a writ of error, on a judgment given in the court of the manors of *Stepney* and *Hackney* in an action of debt for 39 s. The declaration has two counts, one for 13 s. 4 d., for an amerciamment in the court of the manor of *Stepney*, and the other is for £1. 5 s. for money borrowed. Plaintiff makes title as lord of the leet, and says that defendant from continually till 27th of *October*, in the 7th year of the present King, was an inhabitant, and used the trade of victualler within the manor; and that on the 1st of *August*, in the same year, within the same manor, *and the jurisdiction of the same, he sold drink by an unlawful measure, viz. by a quartern pot which wanted a quarter of being full measure; that a court leet for the same manor was held within a month of *Easter*; that another court leet was held within a month after *Michaelmas*, viz. the said 27th of *October*, and the jury did then and there present the said offence, and did amerce the defendant in the sum of which was to the sum of 13 s. 4 d. &c. The defendant pleaded *nil debet*, and judgment was given for the plaintiff, and, thereupon, a writ of error was brought, and exception taken; that it is not shewn upon this record, that the defendant was an inhabitant within the manor at the time of the presentment of the offence, and setting the amerciamment; for it is only said, that the defendant was an inhabitant from until the 27th of *October*, the day on which the court was held, and the amerciamment made. But we are all of opinion that judgment must be affirmed; we admit that in order to give a court leet jurisdiction to amerce, it should be shewn that the party was an inhabitant within the manor at the time of the offence committed, and likewise at the time of the amerciamment set, for the jurisdiction of the leet extends only over the residents, and the case of *Steverton* and *Scrogs*, Cro. Eliz. 698, is sufficient authority for that; and therefore this declaration would have been bad on demurrer. But we are of opinion it is cured

by the verdict, because it must have been proved at the time that the defendant was an inhabitant at the time of the amercement, otherwise the amercement was *coram non iudice*, and fore void, and consequently the jury could not have found that any thing was owing, because that depended on the defendant's being subject to the amercement, viz. by inhabitancy. point, how far a verdict can cure defects in the pleadings, was fully considered in the case of *The King and The Bishop of Ely*, 2 *Str.* 1006; 2 *Barnard. B. R.* 72, S. C. last term: shall not repeat it here; but the common cases of what matter will be cured by the verdict will govern this case; so 3 *Mod.*

So 1 *Salk.* 91, *Hudson and Jones*. So 1 *Std.* 218, *Bickford and Pardne*, which goes much further than this; and cited and relied on as law by my Lord *Holt* in 1 *Salk.* 364, *Other and Oldfeild*.

There has been one thing offered to distinguish this case which deserves consideration, viz. that the saying until the 27th of October is exclusive of and implies a negative of that day, and that therefore it is worse than if there had been no averment of inhabitancy at all: but I say, it is carrying too far, to say, that carries, not only a negative; the most that can be said is, that it is too narrow, and short of the day; and it would be strange to say that a verdict would have aided the want of any averment of inhabitancy at all; and that it does not as well cure an imperfect one: however the day alledged for holding this court next comes not a *scilicet*, and therefore is not material: but it was only material that the court was held within a month after *Michaelmas*, so it was, possibly, proved at the trial, that the court was held and amercement set, which might be proved upon this record, viz. the time that he confessedly appears to be an inhabitant, viz. some time before the 27th of October, and that of itself is a full answer. So judgment must be affirmed(1).

And hence it is a general rule that a verdict aids a title defectively, but not a defective title. 1 *Burr.* 1159. 3 *Wils.* 275. 4 *T. R.* 472. See also 1 *T. R.* 145, 6. 543, and the cases there cited. 7 *T. R.* 521, and particularly 1 *Wms. Saund.* 218, n. (1); also 1 *Salk.* 364, n. (c), and 1 *Doug.* 583.

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2 *Sira.* 1023, S. C.*The Opinion of the Court.*

Where the plaintiff declares in trespass against the defendant for taking certain soil, but does not alledge property therein. *Quarry*, whether, if alledged in the original writ, the defect be aided on verdict?

Certiorari awarded to remove an original *ad informand. conscienc. cur.*, although no diminution alledged.

LORD Hardwicke, C. J. That this is a writ of error on a judgment in the Common Pleas. The plaintiff declares in trespass, for taking 100 cart loads of dung and soil; and upon the general issue, there is a verdict, and judgment for the plaintiff.

The exception taken is, that no property is alledged in the declaration to be in the plaintiff, for that it does not say *finum suum* or *ipsius* the plaintiff.

The answer given was, 1st, that that is aided by verdict: but we are all of opinion that it will not, because if there be a ground for the objection, it is an absolute want of title, and not a title only defectively set forth (1). 2dly, It was said, it is cured by the recital of the original writ, which is in the declaration, where it is properly laid *quare finum ipsius* the plaintiff *cepit*, for that is part of the count, and the count refers to by the *ad valenciam*, &c. and several cases were cited for that purpose; but one of the cases which is in *Cro. Jac.* 536, is to the contrary, viz. that the recital will not help; another case was cited from 1 *Sid.* [150,] 187; but it appears from the same case, in 1 *Keble*, 699, 727, that judgment was given on another point. But there was likewise cited a later case of *Dale* and *Coates*, from 2 *Lutw.* 1509, which is in point, that the recital of the writ does help; and several cases are there cited in point likewise; however, the court there said that if the writ did not help it, the verdict could not. But yet we doubt how far they will be authorities for us in this court, because the fact appears different in the Common Pleas; the writ itself is before the court, being filed of record; and before us there is but a recital of it; and it is a standing rule with us never to reverse a judgment for any variance between the original and the declaration, if the variance appears only from the recital of *the original, till we have the original itself brought before us by *certiorari*: therefore we think the defendant in error should remove the original hither by *certiorari*: and we may award such a *certiorari*, though no diminution be alledged, *ad informand' conscienc' cur'*: as when they send up a wrong original, upon allegation that there is a right original below, we do for affirmance of judgments, but not for reversal (2), award a second *certiorari ad informand' conscienc' cur'*: and when this original is before us, we shall judge if we

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(1) See 4 T. R. 472. *Bull. N. P.* 320. that formerly the court would have

(2) 1 *Salk.* 269. 2 *Str.* 765. 819. granted a *certiorari* to reverse a judgment as well as to affirm it. 2 *Tid.* 907; but see 2 *Bac. Abr.* 205, and the cases there cited, by which it appears, 1146, n. (d).

we are to do as was done in the Common Pleas in the cases in *Lutwich*.

A *certiorari* awarded to remove the original (1).

(1) For the point, as to award of *certiorari*, this case is cited 2 *Tid.* 723, edit. 1812. The final decision appears 2 *Str.* 1023, S. C. probably on the return of the *certiorari*. It was then held that the recital in the writ aided the defect in the count. See also *Andr.* 282. *Com. Dig.* tit. Pleader, (C. 12.) (C. 86.)

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BERN & UX' and MATTAIRE.

2 *Str.* 1015, but not so full. *Bull.* N. P. 53. 4 *Bac.* Abr. 385. *Com. Dig.* Pleader (3 K. 10.) S. C. viz. as to sufficiency of description.

The Opinion of the Court.

LORD *Hardwicke*, C. J. This is an action of replevin wherein plaintiffs declare for taking fourteen skimmers and ladles, and three pots and covers, the goods and chattels of them the said ——— *Bern*, and ——— his wife; the defendant avows the taking for rent in arrear upon a demise; plaintiff pleads in bar to the avowry, and traverses the demise; and issue is joined upon that traverse of *non demisit*, and verdict for plaintiffs that no such demise was; and, thereupon, it is moved in arrest of judgment in behalf of the avowant; and three exceptions taken to the declaration.

1st Exception, That a declaration in replevin cannot be maintained by a husband and wife jointly for taking the goods of the husband and wife.

2d Exception, That it is also a bad declaration in laying it to be to the damage of both.

3d Exception, That it is ill for the uncertain description of the goods taken, it saying fourteen skimmers and ladles, and not saying how many of each sort.

As to the 1st exception, it depends on this foundation, that husband and wife cannot have a joint property in chattels; and, in general, that is true; because the marriage is a gift of all chattels to the husband: but in this case it does not appear that the taking was during the coverture, nor can we presume it was, and the plaintiffs, for ought appears, might be jointly possessed of those goods before marriage; and, if that were the case, that they were so jointly possessed *before marriage, and those goods taken before marriage, they may, after coverture, join in the replevin, and de-

Taking a gross number of different articles without specifying how many of each, held good, on motion for arrest of judgment, by reason that the avowant had avowed the taking.

Where it does not appear that the taking was during the coverture, husband and wife may declare in replevin for taking the goods of the husband and wife; for as they might have been jointly possessed before marriage, so after, they might declare as for the goods of husband and wife.

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clara for taking the goods of husband and wife (1); and, if there can be such a case, we must take it to be so here, because the avowry allows a property in them both, if it may be, by not disputing the property as the avowant might have done. So in the year book of *Michaelmas, Edw. II. fo. 44, 175*, this exception was over-ruled; so in *Bro. Abr. tit. Baron and Feme, pl. 85*, he says, *baron and feme shall not join in replevin*; but *quare* as to goods which she has as executrix, for there it seems they shall join in replevin *de bonis uxoris captis dum sola fuit*; so in *Ventris, 260, Batmore & ux' v. Graves*, in trover, brought by husband and wife. Though the conversion was laid after the marriage, it was held, that in regard the trover was laid to be before the marriage, which was the inception of the cause of action, the wife might be joined; as if one has the custody of a woman's goods and afterwards marries her, she may join in *detinue* with her husband; and *Hale* said, in such case the husband might bring the action alone, or jointly with his wife; and so I take the law to be in this case, that the husband might have declared in this replevin alone, or jointly as he has done. The material authorities that have been cited against this doctrine are, *F. N. B. fo. 69. Let. K*, but it is only that if the goods of a feme sole be taken, who afterwards marries, the baron alone may sue a replevin; and *1 Sid. 172. Powis & ux' and Marshall*, where it is held by *Twysden* and *Wyndham*, that a replevin, so brought, is well brought; and that actions which affirm property ought to be brought by the husband alone (2); and that I must confess is contrary to the opinion now giving, but it is also contrary to the year book of *Edw. II.* and to the *placitum* in *Bro. Abr.* and especially to the case of *Batmore and Graves*, in *Ventris, 260*: for actions of *detinue* are much stronger affirmance of property than replevins.

As to the 2d exception, it will follow the fate of the other, for if there was such a joint possession before marriage, the taking must be laid to be *ad damn' ipsorum*, because the damage survives to the wife. *Cro. Eliz. 259, Gurney & ux' v. Sir Ed. Clere*.

As to the 3d exception, the uncertain description of the goods taken, it was said, that though such a general description might be well enough, by the later cases, in trover and trespass, that yet it is otherwise in replevin, which is an action that affirms property, and where the goods taken ought to be particularized, for a direction to the sheriff to know what goods to return, if a *return habend'* should be awarded.

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*That it is well enough in trover and trespass cannot now be doubted, though there are some old cases to the contrary; yet the modern cases are otherwise, as *Hartford and Jones* (3), which was

Trover for 72 ounces of cloves, mace, and nutmegs, [without specifying

(1) *Com. Dig. Pleading*, (3 K. 10.) 1 *Salk.* 114. 119. 2 *Bl. R.* 1236. 7 *Selw. N. P.* 250. 2 *N. R.* 405. *Chitty Mod.* 105. 1 *Chitty on Pleading*, 62. on Pleading, 62.

(3) 1 *Lord Raym.* 589. 2 *Salk.* 654.

(2) 2 *Saund.* 47, g. *Cro. Eliz.* 133. *pl. 3, S. C.*

specifying the quantity of each]; and judgment by default: and this exception being taken in arrest of judgment was over ruled. So *Harrison and Bottom*†, *Trin. 2 Geo. II.* Trover *de una parcella* of packthread and cords, and judgment in *C. B.* for plaintiff, and affirmed in this court, notwithstanding this exception alledged upon the writ of error. But to shew that the law is different in actions of replevin, they cited the case of *Moore and Clipsam*, which is in *Allen*, 30, and *Style*, 71, which was a replevin of 100 *oves matricēs et vervecēs*; and held bad for the uncertainty in not shewing how many ewes there were, and how many wethers; though the court agreed that *centum oves*, in general, would have been good: but we cannot rely much on this case, for that this very point came in question in *Pas. 1 Geo. I.* in the case of *Kempster and Nelson*, 4 *Bac. Abr.* 387, [ed. 1768], and was very fully considered: that was a replevin for taking *bona et catalla sua*, viz. *quandam parcell' linteī et quandam parcell' papyr' ipsius querentis*: and the avowry was as a distress for rent; and it was excepted in arrest of judgment, that *quandam parcell' papyr' et linteī* was too general and uncertain a description, and though it might be well enough in trover and trespass, yet in replevin it was ill, as not being a sufficient direction to the jury to assess damages, nor to the sheriff in re-delivering the goods: but Lord *Parker*, in giving his opinion, said, that such a declaration would be ill on demurrer, but that the pleadings had supplied the defect, because the avowant having avowed the taking, had, thereby, taken upon himself the knowledge of what the goods were; so that by both parties knowing the goods, makes it certain upon the record that they are agreed in what the goods are, and the only controversy is who shall have them; and it would be no manner of benefit to the defendant to have them particularized; for if the plaintiff had demanded 500 reams of paper, though he proved but one, yet if he prove one he must recover; for, in torts, if the plaintiff prove any part of his case it is sufficient (1); and as to the sheriff's delivering the goods upon a *return' habend'* in case the avowant prevailed, he said the sheriff may require either the plaintiff or defendant to shew him the goods; and it is a good return for him to make *quod nullus venit ex parte defend' ad ostend' aces*: and there is such a return in *Rastal's Entries*, 570, b, and *Dalton's Sheriff*, 274, and in this case of *Kempster*, and in the case of *Moore and Clipsam* was considered, and the court took it to have been determined on the point of an immaterial traverse, for they said, it would be a strange resolution to say, that the addition of circumstances should make it more uncertain *than it was before; and

1733.

BERN & OR
MATTAIN.

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† 2 *Str.* 800. 2 *R. Raym.* 1529. *Barnard. B. R.* 47. [50. 65, S. C.]

(1) See 2 *Chitty on Pleading*, 363.

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and
MATTIAIRE.

and we think the reason of that case of *Kempster* and *Nelson* governs this case: so plaintiff must have judgment (1).

(1) Although the declaration as to this point would have been ill on demurrer, yet the pleadings had supplied the defect, because the avowant having avowed the taking, had thereby taken upon himself the knowledge of what the goods were.

BETWEEN the PARISHES of SPALDING and BOURN.

Bur. Set. Cas. 39, pl. 12. 2 *Sea. Cas.* 299, pl. 181. S. C.

The Opinion of the Court.

In an order of justices, it is sufficient that the county appear in the margin.

It is not sufficient to alledge on an order for removal that the pauper is likely to become chargeable, without saying to "that parish."

LORD *Hardwicke*, C. J. This is an order of two justices for removing a poor person from the parish of *Spalding* to the parish of *Bourn*, which has been confirmed at the quarter-sessions, and two exceptions have been taken.

1st exception. This being an order on *Lincolnshire*, has the division as well as the county expressed in the margent; thus *Lincoln, Holland*; and the order, speaks of the parish of *Spalding* in the parts aforesaid, instead of saying in the county, or in the division aforesaid.

2d exception. That the complaint stated in the order is to the church-wardens, that he is likely to become chargeable, and the justices adjudication is, "we adjudge that he is likely to become chargeable;" not saying "likely to become chargeable to the parish;" nor, referring themselves to the complaint.

As to the 1st exception, we think the order is well enough; for that in orders of removal, a reference to the margent is sufficient. I have a note of the case of *The King* and *Faucet*, *Pasc. 12 Will. III.* which was an indictment for and the court held: If though the county is in the margent, yet if it is not said in the body of the indictment in *Com' præd'* it would be ill in an indictment, though good in a declaration, which is the practice of the court of C. B. And the court took it for granted that an order of justices in the same manner would be good. And the case of *The King* and *Austin*, *Michaelmas, 1724*, is not contrary to this; for there, *Oxon'* was in the margent, and place was said to be near *Oxford*, but was not said to be in the county aforesaid. And I can find no case in the crown-office where an order referring to the county in the margent is ill (2). But

Upon

(2) *Burr. Sett. Ca.* 138. 200, 201, 660, 661, *acc.* where the reference to the margin is clear.

Upon the 2d exception, we think the order is bad, for the adjudication should be that he is likely to become chargeable to that parish; for as it is now left at large, it might be he was likely to be chargeable to his parents, or to another parish, &c. There was a case, *Hil. 5 Geo. I.* between *The Parishes of Barholm and Whitelm*, where the complaint was that the poor person had intruded himself into the parish, and was there likely to become chargeable; and the justices adjudge, he is accordingly likely to become chargeable; and the order was not affirmed, but referred to the judge of assize; therefore, on this exception, the order must be quashed (1).

(1) The stat. 35 Geo. III. c. 101, s. 1, repeals the stat. 13 and 14 Car. II. c. 12, by which paupers likely to become chargeable were removable. And by s. 1. 35 Geo. III. c. 101, no person is to be removed until he become actually chargeable. But the principle of the exception will, it is presumed, apply, namely, that in any order for removal, it must be stated that the pauper has become chargeable to the parish from which he is removed; and that he has become chargeable generally is not sufficient.

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Parishes of
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and
BOURN:
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LLOYD and WILLIAMS.

ONE was joined in this action of trespass in the *simul cum*, and being produced as an evidence for the defendant at the trial of the cause, the plaintiff produced an outlawry against him upon the process in the same action; whereby his testimony was taken away: and now

Worley, pro def., moves to set aside that verdict, because the outlawry was clandestine; the said having been always public, &c.

Lord Hardwicke, C. J. After having been long litigated what evidence should be sufficient to take off the testimony of a person joined in the *simul cum*, it was at last settled by all the judges, that evidence should be given of his being some way concerned in the fact; and that process in that action had issued against him, and endeavours been used to take him; now in this case, if he was outlawed, he certainly had been served with process; but, however, as it might be a clandestine outlawry, a rule was made to shew cause why the outlawry should not be set aside at the plaintiff's costs, and all proceedings on the verdict to stay in the meantime.

Parker, at another day to shew cause, says, that the very title of the stat. 31 Eliz. c. 5, is for avoiding clandestine outlawries of persons whose places of abode are known, whereas it is not made out where the party lived.

Lord Hardwicke, C. J. We only oblige a plaintiff to reverse,
at

If A declare against B with a *simul cum*, viz. C, B shall not be deprived of C's testimony, unless evidence be given of his being some way concerned in the facts, and that process in that action had issued against him, and endeavours used to take him.

Plaintiff not compellable to reverse an outlawry at his own expence, except on account of misbehaviour; where there is mistake or error in law, reversal must be by writ of error.

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at his own costs, an outlawry, when there has been some misbehaviour on his side(1); for if it is a mistake, or error in law, it must be reversed by writ of error; therefore as no misbehaviour appears in the plaintiff, the rule must be discharged(2).

(1) See the authorities cited 1 Tidd. 145. 2 Pr. Dict. title Outlawry, 169. (2) See post, 264; also Park. Ev. sect. 6.

TRINITY TERM,

8 Geo. II. 1735. B. R.

PHILIP Lord HARDWICKE, Lord Chief Justice.
 Sir FRANCIS PAGE, Knt.
 Sir EDMUND PROBYN, Knt. } Justices.
 WILLIAM LEE, Esq.
 JOHN WILLES, Esq. Attorney-general.
 DUDLEY RYDER, Esq. Solicitor-general.

BUCKLER *and* ASH.

IN an action of debt upon bond,
Hosley, moves, that on payment of principal, interest, and costs,
 all proceedings may stay. Granted *per cur'* (1).

Proceedings in
 an action of debt
 upon bond stayed,
 upon payment of
 principal, in-
 terest and costs.

(1) See p. 116, *ante*, S. P. including costs in equity.

THE KING *versus* ANGELL.

THE justices of *Berks* had a petty sessions to search after
 vagrants, and a poor man residing in the parish of *Bingfield*,
 being examined, confessed himself to be settled in the parish of
Sunning; whereupon the justices ordered him to be removed to
Sunning; but the pauper threatened to return, and did return the
 same day to *Bingfield*, pretending to be a hired servant to a pa-
 rishioner of *Bingfield*: (but the court were strongly inclined now,
 upon the circumstances of the hiring being disclosed upon the
 affidavits, to think it a colourable hiring) whereupon the defendant

The committing
 a pauper to the
 house of correc-
 tion without any
 summons, or any
 oath made of his
 return, after re-
 moval, is contrary
 to natural justice;
 and is, therefore,
 a ground for an
 information
 against the jus-
 tices.

who

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who is a justice of peace for *Berks*, and was present at the petty sessions, without any summons, or oath made of his return, committed the *pauper to the house of correction, where he was kept three days; and upon this, the court was moved to grant an information against the defendant.

The court allowed the transactions of the petty sessions in this case, to be irregular, because there was no complaint made of his being chargeable or likely to be chargeable to the parish of *Bingfield*; but yet, as that was only a mistake of judgment, the court would not have thought it worthy of punishment. But the sending him to the house of correction was punishing him, after having convicted him unheard, and that is contrary to natural justice (1); and thereupon, upon the authority of the case of the justices of *Hertsford*, they were for granting the information: but as no malice appeared in the justice, the court allowed the prosecutor to accept of same proposals made by the justice, to make him amends; and so it went off.

(1) Unless through his own default to appear, 1 *Str.* 44, *acc.*

BARTON and Others versus MILES and Others.

Suggestion for double costs against the plaintiff, he being nonsuited, allowed upon an affidavit of the facts to be entered on the roll; there being no other way, as the facts were not apparent upon the record for obtaining the double costs.

Where there is a *unica taxatio*, the court will not notice the several capacities of the defendants.

THE defendants are collectors of the tax for window-lights, and were sued, in an action of trover, by the plaintiffs, who were assignees in a commission of bankruptcy against one *Hart*; and at the trial the plaintiffs were nonsuit on not being able to prove a title to the goods taken; so, last term, *March*, for defendants, moved that they might have double costs, for that they are entitled to them by the act of parliament which gives it them in all actions, for acts done in the execution of their office, where a verdict is for the defendant, or the plaintiff is nonsuit; and the method of doing it is generally upon a certificate of the judge that tried the cause. That the defendants were in the execution of their office; but that could not appear in this case, because the plaintiffs were nonsuit for not shewing a title, so that no evidence as to the taking was heard; but he now produces an affidavit that they were officers, and in the execution of their office, which was read.

And a rule was made for the plaintiffs to shew cause why a suggestion should not be entered on the roll to that purpose: and my Lord Chief Justice said, that though the court gave costs by rule in a late case of this nature, that was done because there was a discontinuance of the plaintiff's action, but that in case of a nonsuit, there is a judgment entered for the defendant to have costs, as is required by several statutes. And now

Wynne, for plaintiffs, comes to shew cause according to the rule; and he admits that double costs must be given in favour of some of the

the defendants, but that two of them were not collectors, but only assistants, and the act which gives double costs does not extend to favour them.

Lord *Hardwicke*, C. J. They must make their suggestion as they can, but we can take no notice of the several capacities of the defendants, for it is *unica taxatio*, and not separate costs for every defendant. Then

Wynne, would have questioned, whether as the parties are out of court upon this nonsuit, there can be a suggestion entered on the roll. But

Lord *Hardwicke*, C. J. said, that point is fully settled, and not to be disputed, and the defendants have no other way to get their double costs. So the rule was made absolute (1).

(1) See *Hul.* 251, S. C. edit. 1810. See also 1 *Str.* 49, 50. *Cooke's R.* 16, post, 138. 2 *Str.* 1021, S. C. *Say R.* 214. 3 *Wils.* 422. 9 *East.* 322. 2 *Tid.* 977. edit. 1812. So where the want of a suggestion for treble costs under the mutiny act was assigned for error in the House of Lords, *K. B.* granted leave to amend the record in that respect; and this on payment of costs in error from *K. B.* provided the writ of error were abandoned. *Dunbar v. Hitchcock*, *H. T.* 54 *Geo.* III. M.S. Mem. The original judgment for treble costs was in C. P. and that court discharged the rule nisi for an amendment, by striking out the word "treble," but without costs. S. C. *M. T.* 54 *Geo.* III. M.S.

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and Others
versus
MILES
and Others.

WARD and THE CHARITABLE CORPORATION.

IN an action of debt upon an obligation entered into by the defendants who are lessees of a house of the plaintiff's for performance of covenants in the lease;

Marsh, for the plaintiffs, moved for leave to plead double, viz. conditions performed, and some acts of parliament made in the fifth and sixth years of the present King, for making void all claims upon the corporation. And

Noell, shews cause; that the acts of parliament are out of the question, because they extend to make void such claims, only, as were made before 1733: whereas it appears on the declaration that this demand of rent was not due till afterwards; so in the case of *Philips* and *Vanderbank*, which was a bond, dated 4th of September, 1732, payable afterwards, was resolved not to be a debt claimable, and consequently not void under the act of insolvent debtors, which commenced 29th of September, 1728. And this appears on the proceedings. The court will not let them plead those acts, as in the case of *Hudson* and *Aglionby*, which was

The Court of *K. B.* allowed a party to plead several statutes, although it appeared that they voided only certain claims made prior to the time the demand specified in the declaration arose.

The plaintiff has his election either to pay costs on amending his declaration, or give an imparlance.

Upon a motion to plead double, viz. infancy, and that the writ of error to reverse the recovery was not brought within twenty years, it appearing to the court by the *teste* of the writ, that it was brought within twenty years, the court refused to let them plead that matter.

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ABLE CORPO-
RATION.

Marsh, then, waived the pleading, conditions performed; and as to what *Noell* says about the acts of parliament, he says, that is not proper now; but upon a demurrer to the plea, for the question is not, now, whether it will be a good plea, but whether we may be allowed to plead these acts of parliament at all.

Lord Hardwicke, C. J. absent.

Probyn, J. The question is, whether as they think this will be a good plea for their clients, we can hinder them from pleading it.

Lee, J. This is matter of construction of the act of parliament, viz. whether this is a demand necessary to be registered by the act, so that if we are to give judgment in this way upon motion it will deprive the defendant of the benefit of an appeal, which he may have from a judgment given on demurrer to the plea.

Per cur'. Rule made absolute (1).

Then *Noell* moved for leave to amend some mistakes in the declaration; and

Marsh says, that the defendant is then entitled to an imparlance, for that upon the plaintiff's amending his declaration, the defendant has his election either to take costs upon the amendment or to have imparlance; but

Per cur'. You mistake the rules, for it is the plaintiff has his election, either to pay costs, or to give an imparlance (2); so, as you take notice of the motion, the declaration must be amended (3).

(1) Although formerly this court, *K. B.* required to be informed as to the matter of the defendant's pleas, in order to judge whether they were proper, *R. T. 5* and *6 Geo. II. (b)*, *K. B.*, yet the rule for leave to plead double is now of course; i. e. granted on counsel's hand; and this case, as to this point, has long ceased to be authority in *K. B.* In *C. P.* the leave is generally of course; but in that court, in certain cases, a rule nisi is yet necessary.

(2) *R. M. 1654*, xiii, *C. P.*; but see *2 Str. 950*.

(3) See *2 Tidd. 715*, edit. 1817, where it is said, that before plea there are no costs payable upon amending the declaration, except the costs of the application; and in the *King's Bench*, the declaration may be amended in matter of form, after the general issue pleaded, and before entry, without paying costs, or giving an imparlance, and for this is there cited *R. M. 10 Geo. II. reg. 2, (b)*, *K. B.*

BAKER and ROE.

Ejectment for so many acres of land with common of pasture *cum pertinentiis*; the words *cum pertinentiis* held not to extend to common in gross, but to relate to the land.

WRIT of error upon a judgment in the Common Pleas in ejectment; the ejectment was brought for so many messuages, and so many acres of land, with common of pasture *cum pertinentiis*.

Parker, for the plaintiff in error. That common *cum pertinentiis* must be taken to be common in gross; and for common in gross ejectment does not lie. *Cro. Car. 492*, and *Hardres*.

Lord Hardwicke, C. J. absent.

Page,

Page, J. This I think cannot be taken to be common in gross, for that is always described by common for so many horses or cows, &c.

Probyn, J. The words *cum pertinentis* must relate to the land, for we shall not presume common to be in gross unless laid so; and there are a hundred precedents in this way and the exception never taken.

Lee, accord'.

Judgment affirmed.

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BARNARD and ROA.

THE KING and The MAYOR of WORCESTER.

WENNE moves for a *mandamus* to the mayor of Worcester to sign the poor's rate, for the statute of *Eliz.* requires that it should be signed by a justice of the *quorum*; and he produces an affidavit that the mayor is the only justice of the *quorum* residing there, and he refuses.

Cur'. Take your *mandamus* (1).

(1) By the stat. 43 *Eliz. c. 2. s. 1.* or near the parish or division; see 1 the rate and taxation shall be made. *Str.* 393, where the allowance by the with the consent of two justices, one justices is said to be matter of form whereof is of the *quorum*, dwelling in only, 1 *Barnard.* 82, S. C. 1 *Sid.* 377.

EDWARDS and VESEY.

PLAINTIFF is an under officer to the commissioners of lieutenancy for the city of London, and being fined for some neglect of duty, a distress was taken for the fine, viz. a silver cup, and he has now brought an action of trespass against the defendant for taking that cup; and the cause being brought down by proviso for trial to-morrow at the sittings.

Dennison, for plaintiff, moves that he may have liberty to inspect the books and papers of rates and assessments of the said lieutenancy for the year 1729, and that the commissioners or their clerks may attend with the books at the trial.

Cur'. We cannot make a rule upon them to attend, but let plaintiff have liberty to inspect for the year 1729, and to take copies at his own charge.

The next day **Dennison** moves for the plaintiff again, that the trial may be put off to next sittings, in regard they had not had time

Rule to inspect the books of the commissioners of lieutenancy for the city of London, granted.

Notice of an intention to move on the day of trial, to put off a trial must be previously given to the opposite party, together with copies of the affidavits on which the motion is intended to be grounded.

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time enough between yesterday and to day for a proper inspection; and had an affidavit of the bulk of the books, &c. But

Cur'. Seemed to think it an affectation of delay, because they might have applied sooner for such liberty; but however that the rule is, if you move to put off the trial on the day of the trial, that you must not only give notice of the motion, but likewise give the other side copies of the affidavits which are to be produced, and that not being done here, they would make no rule (1).

(1) Cited for both points, 1 *Tid.* general practice in respect of putting 198. 2 *Tid.* 783. edit. 1812. See also off trial in both courts. *Pr. Dict.* title *Trial*, sect. v, for the

THE KING and The COMPANY of CUTLERS.

On motion for a *mandamus* to restore one to an office, no affidavit that he once enjoyed it, is necessary; as that fact may be stated in the return.

— moves for a *mandamus* to the cutlers company to restore one to be in the court of assistants of the company; and produces an affidavit that he was once in the courts of assistants, and was turned out.

Cur'. Take your *mandamus*, but there needs no affidavit, for if he was not an assistant they may make that their return.

WILKINS versus PERRY and SALTER, SHERIFFS of LONDON.

The court will not at the instance of the plaintiff strike out a count in a declaration after time to plead (2).

DRAPER, in an action of debt for an escape, moves for defendants, that the plaintiff may be obliged to strike out one of the counts in the declaration; for that they are exactly the same: there are two counts: one lays that at the time of the delivery of a declaration, the escaper was a prisoner in the custody of the sheriffs; and the other lays it that the sheriffs had arrested *Heron* the escaper by his body. The inconvenience to the defendants is, that they must prove in this case two *recaptions*, on fresh pursuit.

Lacy, came to shew cause, and could not make it appear that any evidence could be produced to prove one count, which could not prove both; yet

The court would not oblige the defendant to strike out one of them, but discharged the rule. And it was said by

Lee,

Lee, J. I do not apprehend the court ever strikes out counts unless they appear to be put in for vexation.

Lord Hardwicke, C. J. As you have obtained time to plead upon this declaration, without applying to the court to have it struck out, or *referred to the master, which is the usual way, I think the rule must be discharged: and though I cannot see what evidence can be produced to prove one of the counts which will not equally prove the other, yet it may be pretty hard to restrain the plaintiff from laying his case in his own way when it does not appear he intends to be vexatious (1).

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versus
PERRY and
SALTER,
Sheriffs of Lon-
don.
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(1) Cited by name, Pr. Dict. title *Declaration*, l. p. 361. 363; where the difference of practice between *K. B.* and *C. P.* in this respect is noted. See also the authorities cited 1 *Tid.* 617; but the point is elaborately discussed 2 *Doug.* 664, *et notis.*

THOMPSON and BAKER. In Error.

SAYER for defendant in error, produces an affidavit that neither the plaintiff nor his attorney can be found; and therefore moves, that the fixing up a rule to assign errors in the King's Bench office may be sufficient notice. Granted (2).

Where neither the plaintiff in error or his attorney can be found, motion that fixing up the rule to assign error in the office *K. B.* may be sufficient, granted.

(2) See *R. H.* 9 *Geo.* III. by which the fixing up is in such case deemed good service.

THE KING and HAWKER.

UPON *Yate's* motion, a conviction of hawker for keeping a pack of hounds for destruction of hares, he not having a qualification, was quashed by the court; no summons being set out in the conviction (3).

A conviction where no summons is stated to have issued, quashed.

(3) And see 2 *L. Raym.* 1405. 2 *Str.* 630.

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THE KING *versus* Dr. HENCHMAN.

A *mandamus* lies to the ecclesiastical officer to swear in a churchwarden.

ON *Filmer's* motion a *mandamus* was granted to compel Dr. *Henchman*, who is to swear in one to be churchwarden of the parish of *Finchley* (1).

(1) *Osbs.* 243. And such ecclesiastical judge cannot return that the party is incompetent to act, 1 *Ld. Raym.* 138. 1 *Salk.* 166, S. C., nor that the bishop had inhibited him from acting, 1 *Str.* 610, but he may return that the party was not elected, 2 *Ld.*

Raym. 1405, and see *id.* 1979, *contra dicitur* the reporter, although, if the *mandamus* direct him to swear one chosen, and the return state that he was not duly chosen, it is naught, 2 *Salk.* 433. Neither *de pñdms*, 3 *Butr.* 1420.

CHARITABLE CORPORATION *versus* WOODCRAFT.

Rule to inspect the books of the Charitable Corporation refused; it being doubted *per cur.* whether they were public.

IN an action of covenant against the defendant as security for *John Thompson*, late warehouse-keeper to the charitable corporation, the issue is, whether *Thompson* actually did receive some certain goods with which he is charged. And

Draper, for defendant moves for liberty to inspect the corporation books, as being public books.

Cur'. Doubted whether they were public books, and so would make no rule; but they told *Draper*, he might give them notice to produce them at the trial (2).

(2) 1 *Ld. Raym.* 705. 2 *Ld. Raym.* the leave is of course. See p. 245, *post.* 927. 1 *Barnard.* 466. *Bar.* 236. 2 *Bl.* *The King v. Hollister*; and 1 *Tid.* 591, R. 850. 1 *T. R.* 689, where it is said *ed.* 1812.

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WILLIAMS *and* NASH.

An attorney not entering an appearance pursuant to his undertaking by an indorsement on the writ, incurs contempt.

AGAR, for plaintiff, moves for an attachment against Mr. *Eadnell*, the defendant's attorney, for not entering an appearance for the defendant, as he undertook to do by indorsement on the bill of *Middlesex*.

Cur'. You should have a rule upon him first, or else it is no contempt; therefore as he takes notice of the motion, let him enter an appearance according to his undertaking (3).

N. B.

(3) 2 *Str.* 693, S. P. But the undertaking must be signed by the attorney; writing it is not sufficient; see *Leff.* 192, 193, (n), 2d edit.; see also 2 *T. R.* 418. Yet an agreement in writing, to put in bail, made by a third person with the bailiff, in consideration of his discharging the party arrested, is void by stat. 23 *Hen. VI.* c. 9.

N. B. If he had not taken notice they would only have made a rule to shew cause.

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WILLIAMS
and
NASH.

BETWEEN the PARISHES of NORTHLEITON and
EATON.

Bur. Sett. Cas. 47, pl. 14, S. C.

AN order states that a pauper was hired for and served a year, except that he was absent from his master's service, in the middle of the year, for three weeks without his master's consent, and adjudges that he thereby gained a settlement as a service for a year.

Mr. *Makepeice*, moves to quash the order, for that such service is not a service for a year, and therefore gains no settlement.

Abney, contra, cites a case of *The King and Inhabitants of Islip, Stra.* 423. *Fortesc. Rep.* 305. *Cas. of Set. and Rem.* 97, l. 129, fol. 262, where the servant was absent thirteen days in the year, and even had a proportionable part of his wages abated; and yet adjudged a good service, and gained a settlement.

Lord *Hardwicke*, C. J. If it were not so, it would render these settlements the most precarious that could be; and this has always been the construction of the act†, if the master takes the servant again. Order confirmed (1).

A pauper adjudged a settlement on the ground of a hiring for a year, although it appeared he had been absent during such hiring for three weeks together, without the consent of the master.

† Stat. 8 & 9 Will. III. c. 30. s. 4.

(1) The cases where objections to be hired pauper obtaining a settlement have been raised on the ground of temporary absences, are very numerous, but they seem to admit of being chiefly classed, 1st. Where the mutual determination of master and servant to dissolve the contract is not apparent, as in the present case, and see 1 *Str.* 423. 2 *T. R.* 624, 627. 4 *T. R.* 804. 5 *T. R.* 657. *Stat.* 37 *Geo.* III. c. 3. s. 22. 8 *T. R.* 236. 13 *East.* R. 51. 2d. Where that determination is apparent. See *Bur. Sett. Ca.* 461, b. 688. 2 *Const.* 323, 324. 32. 3 *T. R.* 754. 6 *T. R.* 185. 464. 7 *T. R.* 338. 4 *East.* R. 351. 356. 12 *East.* l. 482. 550. 3d. Where the absence

was preconcerted on the part of the master, in order fraudulently to deprive the pauper of his settlement. See 1 *Str.* 526. 2 *Const.* 326. See also 2 *T. R.* 626. 4th. Where the absence was procured by fraud. See 2 *Const.* 303. *Bur. Sett. Ca.* 565. 5th. Where by the act of the pauper the service is considered incomplete. See *Cald.* 11, ib. 57. 129. 2 *Const.* 322. 2 *T. R.* 598. 4 *T. R.* 100. 2 *East.* R. 303. 9 *East.* R. 206. 6th. Where the hiring itself was incomplete. See 7 *East.* R. 471. In most of these cases thus classed, the *animus revertendi*, the distinctive character of a suspended, rather than of a determined contract, is discussed or considered.

1735.

FISHER and SOWERBY.

Upon *mul tiel* record, the variance objected was, that on the continuance roll, the year of our Lord, and "George the 2d, the now king," were in words at length, and in the record of the proceedings continuance the replication, &c. the year was in figures, but also interlined in words; and that which related to the king was "George, now king;" omitting "the second;" the figures, held not to be variance, but surplusage, and so likewise "the second."

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ACTION on the case upon a promissory note; defendant pleads the statute of limitations; plaintiff replies that the cause of action accrued and that within six years before that time, viz. *Trin. 11 Geo. I.* he sued out a bill of *Middlesex*, and shews it *duly continued till the death of the late King, and that *Friday prox' post Crast. Trin. 1727*, another precept was sued out, returnable *Monday prox' post Tres Mich.* then next; before which day, viz. *June 11*, in the year of our Lord 1727, the said King *George* the first departed this life, to wit, at *Westminster* aforesaid: at which day, to wit, said *Monday* next after *Tres Mich.* he, said plaintiff, came and offered himself, &c. to wit, before our Lord *George II.* now King of *Great Britain*; and then shews the continuance until the filing the present declaration, and prays it may be verified by the record. Defendant rejoins that there is not any such record of a precept in the said replication of the said *Joseph* first above mentioned, and proceedings thereon affiled or now remaining of record in the said present Majesty's court. Plaintiff surrejoins, that there is such a record of the said precept and proceedings thereon, &c.

Dennison, produces the pleadings now entered on the bill of last term, and moves that he may have leave to verify his replication by the record; and for that purpose the *custos brevium*, Mr. *Tully*, attends with the file of bills of *Middlesex* and the proper continuances.

Field, objects that they have not verified their replication, for that in the continuances there is a variance between the continuance roll and the record of this replication; for that the continuance roll sets out properly the death of the late King, and that the present King *Geo. II.* came to the crown the 11th of *June*, 1727, in words at length, but that this replication puts the year of our Lord in figures, and the continuance calls the present King, *George* now King, whereas the replication has it, *George the 2d* now King.

And on looking in the record, it appeared to be so, only in the replication, as to the year, it was in figures, and an interlineation likewise of one thousand seven hundred twenty seven, in words at length.

Lord *Hardwicke*, C. J. There is no variance, for the figures 1727, shall be rejected as surplusage; and the words, the 2d, shall also.

So plaintiff has verified his replication (1).

N. B. *Ventris*, the master objected, when *Tully* produced the file of bills of *Middlesex*; that he has no right to the filing of them, but

(1) See *Dy. 234 a. 11 East. R. 508.* 13: *Id.* Record (B), (C), (D); see *Com. Dig. Pleader, (3 B. 15), (2 W. also 4 T. R. 590.*

but that they ought to be filed with him as master of the office, for that in the grant to the *custos brevium* there is an exception of all queriturs and attachments, and the court said they would take it into consideration, but they let this motion go on without prejudice to the dispute of either side.

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FISHER
and
SOWERBY.

*COLLET *versus* JENNIS.

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STRACY moves that the recognizance of *B*, one of the bail for the defendant, may be discharged, and another person, one *Spillet*, may be made bail in his room; because that said *B* is a material witness for the defendant.

And *Spillet* came and offered himself, and undertook to be bail in court and justified.

Cur'. Therefore ordered the name of *B*, to be struck out of the bail-piece, and *Spillet's* name to be inserted in his room (1).

(1) This case seems to have escaped the writers on practice, but see *Barnes*, 69. *Imp. C. P.* 187. *S. P.*

On affidavit that one of the defendant's bail is a material witness for him in the cause, and upon adding and justifying another in his stead, the name of such bail will be struck out of the bail-piece.

HUDSON -Executor of GROVE *versus* STALWOOD and
Al' Executors of STALWOOD.

IN an action of debt on bond, whereby defendant's testator, together with one *Hicks*, were jointly and severally bound to the plaintiff's testator; defendant pleads that *Stalwood* the testator in his life-time, and the said *Joseph Hicks*, paid off the bond. Plaintiff replies that the said *Stalwood* and *Hicks* did not pay it *modo et forma* as pleaded; and thereupon issue was joined and a verdict given for plaintiff; and it appeared in evidence, that a small part of the bond was paid by the said *Stalwood* in his life-time, and the rest was paid off by *Hicks* after *Stalwood's* death.

And *Dennison* moves for a new trial, and the question is thereupon, whether the evidence verified the defendant's plea. *Dennison* argues that it did so, for that *Stalwood* could not pay the money, but in his life-time; so that the words, in his life-time, must be thrown out, and then it is a plea of payment by *Stalwood* and *Hicks*.

But, however, if they are to recover, that is not a material circumstance;

the plea. The defendants might have pleaded the facts as proved; or, that

Where in an action of debt upon bond against the executors of *B*, one of the obligors, *C* being the other, the defendants plead that *B* in his life-time and *C* paid off the bond, and the evidence in support of the plea is, that *B* paid only a small part in his life-time, and that *C*, the other obligor, after *B's* death, paid the remainder, held, that the evidence does not support *C* paid the whole.

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cumstance; for the substance was, whether the principal and interest due on the bond was paid or not; and therefore if *A* and *B* are bound, and *B*, only, is sued and pleads payment, and the evidence that the money was by *A* that is evidence of *B*'s plea.

Cur'. No doubt of it.

And he cites the case of *Hingen and Payn*, *Cro. Jac.* 475, which was debt on bond for performance of covenants, and the covenant *was to deliver up possession to the lessor at *Michaelmas* or after, being the end of the term, upon request, and the breach assigned was, that though *J. S.* and *T. D.* the lessors made request, the defendant had not delivered possession, and issue thereupon, and the evidence was that *J. S.* only made request, and held that warrants the breach assigned, for that the demand by one is the demand of both. Cites *Yelv.* 148, *Goodman v. Ayling* (1), held, that though the verdict agrees not with the plea in the nature and manner of the tenure, yet if it agrees in substance it is enough. And he cites *Hob.* 72, *Pope* and *Skinner*, which is to the same purpose; so here the point and substance of the issue is, whether the money was paid before the bringing of the action, and it is quite immaterial whether it was all paid at one and the same time. He had a rule to shew cause; and then

Lord *Hardwicke*, C. J. who tried the cause, says, it appeared that *Hicks* only entered into this bond as security for *Stalwood*, but took no counter-bond; so that this action was only brought to enable *Hicks*'s executors to recover over; for, if it had been, only, a single question between the plaintiff and defendant, whether the money was paid or not, I should be for extending the words of the plea as far as possible; but, it appeared that this action was only to reimburse the security, and *Stalwood*'s executors had taken advantage of the act for amendment of the law (2), and pleaded payment by the security, to an action wherein the security in effect was suing for his reimbursement, and that is a defect in the statute; and then the question was, whether the evidence did maintain the issue, viz. whether there was evidence of payment of the whole sum by *Stalwood* in his life-time and *Hicks*.

The defendant might have pleaded to this action two ways, either according to the truth of the fact, that *Stalwood* paid part in his life-time, and *Hicks* the remainder after *Stalwood*'s death, and so that the whole money was paid before the action brought; or, else, according to the operation of the law, that *Hicks* paid the whole; but he has taken another method; and I must confess I think the words, in his life-time, are of no great consequence. But supposing these words not in the plea, the payment is still pleaded as an entire fact, when it comes out not to be so; for the last payment was for *Hicks* and for the executor of *Stalwood*; and therefore I think the plea should not have any strained construction.

Page, J. Can any one say that payment after *S*'s death was payment

(1) 1 *Brownl.* 213, S. C.

(2) 4 *Ann.* c. 16. s. 12.

payment by *H.* and *S.*? for you ought to prove the payment as you plead it; or suppose *H.* had paid the whole after *S.*'s death, would that have maintained the plea? and yet this is same case.

Rule discharged, no new trial (1).

(1) The plea in this case may be assimilated to those declarations containing either matters of fact, or averments which are essential to be proved as specified or laid; see 2 *East*. R. 2. 4 *East*. R. 107. See also 2 *Doug.* 669 n. [† 138], and the authorities there cited; see also 1 *Chitty* on Pleading, 480, where this case is cited.

1735.
Hudson
Executor of
Grove
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STALWOOD
& A^r Executors
of STALWOOD.

*HOLT and MABBERLEY.

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THEED, in an action of debt on bond, moves to plead double, *non est factum*, and coverture in the plaintiff; but

Cur' refused it, because one is a plea in bar, and the other a plea in abatement (2).

A defendant cannot plead both in bar and in abatement at the same time, to the same matter.

(2) Such a plea would be demurrable, see p. 127, *ante*, n. (1). But in some cases the defendant may plead in abatement to one part, and either in abatement or bar to the other part of the same declaration. *Com. Dig.* tit. Abatement, I. 5. And in an action against two defendants, each may plead distinct matter in abatement of the same suit, *id. ib.* 6; or one may plead in abatement and the other in bar, *id. ib.* 7; see also 1 *Chitty* on Pleading, 447.

BRISTOW and TITO.

FORTESCUE moves to change the *venue* from *Wilts* to *Dorset*, upon an affidavit that the cause of action, if any, arose in the town of *Poole*, which is a town and county of itself.

Per Cur'. We never change a *venue* but into the county where the cause of action is sworn to arise, nor, even, then neither, if it is a place where the judges do not go (3); so you can take nothing by the motion; but, however, if you can find an instance of its having been done, you may move it again.

Venue refused to be changed from one county to another, where it was sworn that the cause of action arose in a third.

(3) That is, if the cause will be delayed: in *Michaelmas* or *Hilary Term*, for instance, it cannot be changed to either of the four northern counties, or to cities, or towns having no local assizes. See the authorities cited, 1 *Tid.* 606, edit. 1812. *Pr. Dict.* title, *Venue*, s. ii.

1735.

MORAVIA'S CASE.

Unduly discharging a debtor out of their prison by the judges of an inferior court, subjects them to information or attachment.

ON an application for an information against the Judges of the court of the borough of the *Devizes* in *Wilts* for a misdemeanour in their office, in unduly discharging a debtor out of their prison.

Lord *Hardwicke*, C. J. said, such a misdemeanour may be punished by information, and also by attachment; being considered as a contempt of this court; which has a general superintendancy over all inferior jurisdictions (1).

But in this case the affidavits were not sufficient, and so no rule was made.

(1) 1 *Salk.* 201. 2 *Ld. Raym.* 766. P. C. c. 3, s. 10, 7th edit. and the author, C. *id.* 396, acc. See also 2 *Hawk.* authorities there cited, marg.

RATCLIFF and BURTON.

Upon a judgment against two, one cannot bring error.

Nor if so brought, can the writ be amended.

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JUDGMENT was given in the Common Pleas against *Ratcliff* the now plaintiff in error, and another defendant; on which judgment *Ratcliff*, alone, has brought a writ of error. And

* *Parker* moved to quash the writ of error, for that, as the judgment was against two, this writ of error cannot be brought by one of them only; and for that he cited a case of *Brewster* and *Turner*, 1 *Stra.* 233. *Michaelmas*, 6 *Geo. I.*, and *Cooper* and *Ginger*, 1 *Stra.* 606, 8 *Mod.* 305. 2 *Ld. Raym.* 1403. *Michaelmas*, 11 *Geo. I.*, and now

Taylor to shew cause says, That the writ of error is amendable under the stat. 5 *Geo. I. c.* 13, which says, "That all writs of error wherein there shall be any variance from the original record, or other defect, may and shall be amended and made agreeable to such record, by the respective courts where such writs of error shall be returnable." Or however the record being removed here, shall remain here, and we may have a writ of error *coram vobis residen'*. *Yelv.* 6, Lord *Cromwell* and *Andrews*. *Godbolt*, 375, *Dean and Chapter of Carlisle*, and 1 *Roll. Abr.* 753, let. Q. pl. 2. So likewise the case cited by Mr. *Parker*, of *Cooper* and *Ginger*, which was exactly this case. Judgment given against two, and a writ of error brought by one only, and there, though the court quashed the writ, yet they held the record was removed, and they allowed a writ of error *coram vobis*.

Parker does not dispute but a writ of error *coram vobis* would lie, if there were proper parties, but the court cannot proceed without proper parties, because the damages must be joint.

Lord

Lord Hardwicke, C. J. It cannot be doubted but this writ of error must be quashed; and I am not at all satisfied that by the act of 5 Geo. I., we can amend it; the way is, if one defendant will not prosecute a writ of error, for the other to proceed by summons and severance (1). I should think that as the act says, not only variance from the record, but other defects, may be amended; we might upon those words amend any defect in form; but the fault in this case is substance; for it is want of parties. The party who brings a writ of error has a right to a *sci. fac. ad audiend' error'*; and how can we, at the single instance of one of the defendants, bring a party into the cause?

Page, J. Suppose we should think fit to reverse this judgment, can we reverse it in favour of a party that is not before the court?

Probyn, J. If you can bring the other defendant to be joined in this writ of error, why it may subject him to a penalty of costs, though he is now fully satisfied what is the judgment below.

Lee, J. This would be to force a man to join in a suit *nolens volens*.

* *Per Cur'*. The writ of error must be quashed, and by the stat. 4 Anne, c. 16 (2), for amendment it must be with costs for the defendant in error (3).

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RATCLIFF
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(1) See 2 Str. 783. But if a party not aggrieved by the judgment be joined in bringing error, the writ may be amended by striking out his name. 2 Str. 892. 2 Cowp. 425. 1 Bl. R. 1067.
(2) Sec. 25.
(3) The authorities for this are very numerous: they are collected 1 Str. 234, n. (1). The case here reported was cited *arguendo*, 2 T. R. 73. See also 2 Str. 834. 2 Tid. 1094, ed. 1812.

STACEY and SUTTON.

The Same and ———.

DENNISON: Plaintiff recovered some lands in ejectment, and has brought several actions against the several defendants, who are occupiers of small parcels thereof, and are some little sums in arrear; he has brought several actions of trespass for the *mesne* profits; and *Dennison* for the defendants moves these actions may be consolidated. But

The court refused to do it, and said they could not oblige the plaintiff to join them. But if several actions of trespass be brought for one and the same cause against the same defendant, the court will order the plaintiff to join all his actions into one, if it may be done conveniently. *Style Pract. Reg. tit. Trespass* (4).

Where several actions of trespass are brought against several defendants for the same profit of lands recovered by the same ejectment, the court will not direct them to be consolidated. *Aliter*, where several are brought for one and the same cause against the same defendant.

VAUGHAN

(4) Cited 1 Tid. 615, ed. 1812. And see 1 Str. 420.

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VAUGHAN *and* NORRIS.

Where in a replevin bond the condition was to appear in the county court, and then and there prosecute with effect, the removing the cause by *recordari* into the C. P. and being there nonsuited, is a breach of the condition for which an action of debt upon the bond lies. The words "then and there" relate to so much prosecution as shall lie in the county court, but do not restrain it.

ACTION of debt in the Common Pleas upon a replevin bond: the condition whereof was, to appear in the county court, and then and there to prosecute with effect; and breach assigned, that he did not prosecute with effect; defendant pleaded that he did then and there prosecute with effect; plaintiff replied that the present defendant removed the cause by *recordari* into the Common Pleas, and was there nonsuited: defendant demurred to the replication, and judgment was given for plaintiff; and thereupon a writ of error is brought into this court.

Page, J. I think the replication is well enough; for the bond is broken: for the defendant was thereby bound to prosecute that cause with effect. Besides, he was to indemnify the sheriff, and the removal of the cause and nonsuit thereupon is a damnification of the sheriff. Besides, the words, "then and there," relate to his appearing, and he is bound to prosecute with effect afterwards.

Lee, J. The "then and there" relates to so much prosecution as should be in the county court, but does not restrain it. Judgment affirmed (1).

(1) See 12 *Mod.* 380. 7 *Mod.* 380. *Carth.* 519. 2 *Selv.* N. P. 1117, edit. 1810.

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* EDGAR *and* FARMER.

Service of process is bad where a sight of the original being demanded is not granted.

No advantage can be taken of irregularity in the service of the process after interlocutory judgment.

Common bail must be filed of the term the writ is returnable.

ON the Master's report as to the regularity of a judgment it appeared that the defendant was served with a copy of process, but did not see the original process though he demanded it (1), and therefore took no notice, but let plaintiff sign his judgment. It appeared likewise that the writ was returnable in *Easter* term, and plaintiff filed common bail as of *Trinity* term, and so signed judgment in *Michaelmas* term.

Per Cur'. The service of the writ was bad, but is cured by defendant's letting judgment go, though he knew it (2); but the irregularity of filing the bail remains; for when a writ is returnable in one term, if bail is not filed of that term, but of a subsequent term, the cause is out of court; and for this irregularity the judgment must be set aside (3).

VALENTINE

(1) See 1 *Tid.* 171.

(2) But service on a *Sunday* being void, 1 *Salk.* 78, by the stat. 29 *Car.* II. c. 7, s. 6, may be objected to even after rule to plead given. 3 *East.* R. 155. B. 8 *East.* 54. n. (b).

(3) 2 *T. R.* 719, 720. *Holmes v. White*, *Imp. K. B.* 561, 562. *S. P.* Also cited 2 *Tid.* 241. But it may be filed any time before the *4to die post* of the succeeding term, as of the preceding term. 6 *East.* R. 314.

VALENTINE *and* FAWCET.

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2 *Stra.* 1021. [S. C. but not so full.]

TRESPASS; the defendants are overseers of the poor, and the trespass complained of was, distraining a silver spoon for a poor rate, and a verdict given for the defendants; and the Chief Justice has certified that the matter complained of, was a fact done in execution of their office; and last term *Kettleby* moves for leave to enter a suggestion to that purpose on the roll, in order to have a writ of inquiry of damages; he moves upon the stat. 43 *Eliz. c. 2, s. 19*, which enacts, "That on suits brought against the overseers on such distress, after such issue tried for the defendant or nonsuit for the plaintiff after appearance, the same defendant to recover treble damages, by reason of his wrongful vexation in that behalf, with his costs also in that part sustained; and that to be assessed by the same jury, or writ to inquire of the damages, as the same shall require."

Lord *Hardwicke*, C. J. I do not remember any case upon this act of parliament†. The penning of this clause is very different from those clauses in the statutes of *James I.*; for those statutes give no damages, but only costs, so that if the judge certifies, there is no need of a suggestion, but only where the judge omits certifying, or where judgment goes by default (1); but, here, this statute expressly gives the defendant damages, and if these are to be settled by the writ of inquiry, that writ ought to issue from the record, and for that purpose I should think there ought to be a suggestion entered.

The court then made a rule for plaintiff to shew cause why such a suggestion should not be entered; and now this term

Marsh, for plaintiff, comes to shew cause.

They cannot shew one case where the jury at the trial might have assessed damages and did not, that the court have after allowed a suggestion in order for a writ of inquiry. On the contrary, in 1 *Roll. Rep.* 272, *Brampton v. —*, in trespass where the defendant justified under this statute the plaintiff was nonsuited, and the judge certified, and on a motion for a writ of inquiry of damages for the treble damages, Justice *Dodderidge* said, that the words in the statute, as the same shall require, are to be understood, that it

Where in an action brought against overseers of the poor for a distress made by them on 43 *Eliz. c. 2*, they obtained a verdict, but the principal jury omitted to assess the damages, as by that statute directed in their behalf, the court will award a writ of inquiry for that purpose; but a previous suggestion on the roll that the defendants were acting in the execution of their office is necessary.

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† But see a case on this act in *Yelverton*, 176, *Oakley v. Salter*, where one of the points determined was, that the damages ought to be assessed by jury, and trebled by the court; and that the court, thereupon, may give

costs *de incremento*; for no evidence for costs can, properly, be given to the jury: these depending on the usage of the court where the suit is. The same case in *Noy*, [137].

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it shall be tried by the writ of inquiry in such cases as it ought to be by law, *scilt.* on discontinuance or demurrer, for the words of the statute imply so much, and by law when a jury ought to find something and does not, that cannot be supplied by writ of inquiry, because then the party would be ousted of his attain; but says the book, I allow, in the case at bar the inquiry was granted *per Cur'*; for the plaintiff being nonsuit, the jury could not have assessed damages, and I allow also that it has been done in nonsuits and upon discontinuances.

Bootle, with him. This case is within the reason of the case of *Sheafe* against *Culpepper*, 1 *Leo.* 255, in replevin. On issue of *non concessit*, the jury inquired of the value of the cattle, but did not inquire what rent was in arrear, and therefore the court was moved upon the stat. of 17 *Car.* II. c. 7, to have it supplied by writ of inquiry, which statute says, "That if the plaintiff shall be nonsuit after issue joined, or the verdict go against him, the jurors impannelled or returned to inquire of such issue shall at the prayer of the defendant inquire concerning the sum of the arrears and the value of the goods or cattle distrained." But the court refused it. It is also within the reason of the case of *Ackman* and *Row*, 2 *Ro. Abr.* where it is held that consequential damages not being assessed by the jury cannot be supplied by writ of inquiry.

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Kettleby, in reply, cites a case in point, which is in *Carthew*, 362, *Herbert* and *Waters*, where in trespass the defendants justified under this statute, and at the trial plaintiff was nonsuit, and a writ of inquiry afterwards awarded; and there the court made this distinction, that where the matter omitted to be inquired by the principal issue is such as goes to the very point of the issue, and upon which if it is found by the jury, an attain will lie against them by the party, if they have given a false verdict; there such matter cannot be supplied by writ of inquiry, because, thereby the plaintiff may lose his action of attain, which will not lie upon an inquest of office. But, where it doth not go to the point in issue, or necessary consequence thereof, but are things merely collateral, such as the damages in that case, and the four usual inquiries on a *quare impedit*, such may be supplied by a subsequent writ of inquiry without damage to the party; because, if the same had been inquired into by the principal jury, it would have been (as to those particulars) no more than an inquest of office, upon which an attain will not lie. The same case is also in *Salk.* 205, and 5 *Mod.* 118.

Lord *Hardwicke*, C. J. I do not find any case cited directly in point, so that we must give our opinion according to the reason of the law, and to do justice in this particular case, according to the directions of the act of parliament; and I think we may, and ought by the act, to grant a writ of inquiry in this case. The words of the act are sufficient to take in this case, viz. the direction that the damages be assigned by the same jury, or writ to inquire of

of the damages, as the case shall require. And, if the words of the act of parliament are large enough, the next question is, whether this case falls within the reason of the law, for that is the best rule to go by in extending acts of parliament. And I take it upon *Cheney's* case in 10 *Coke*, [118], that when the omission by the jury in their finding, is for something for which an attaint would lie, that such a finding would have been part of their office, and could not be supplied afterwards; but, when a direction is super-added by an act of parliament for their finding some collateral matter, what they do therein, is but as inquest of office; they are not sworn to inquire of it, nor does an attaint lie against them for false finding; and this is the law in the instances put of a *quare impedit*.

But it was endeavoured to distinguish this case from those where nonsuits only have been, this being after a verdict given; for, it was said, that on a nonsuit, plaintiff being out of court, the jury could not go on to inquire of damages, and therefore such suppletory inquiry of damages is allowed, in that case, out of absolute necessity. But I take it, the principal jury might go on to inquire of damages, even, upon a nonsuit; so that, I see no difference between the two cases; nor did the judges in the case in *Carthew* found their opinion on any such difference, but, only, whether it were a finding for which an attaint lay, or not.

*The only case which seems to be against me is, that in 1 *Lev.* 255: but, possibly, there, the court might ground themselves upon the particular† penning of the statute, which restrains the finding the arrears to the principal jury; but, here, the words of this act leave it to the discretion of the court, according as the justice of the case may require: and, I think in this case, it is justice to award an inquiry, and to let a suggestion be entered on the roll for that purpose.

Lee, J. Though no case has been cited in point, yet I think *Lord Holt's* reasoning in the case of *Herbert and Waters*, in *Carthew*, governs in the present case; and the only proper answer to that, would be to shew that this statute restrains the inquiry to be by the principal jury; for if it does not, it is highly reasonable that the court should supply that omission.

Per tot' cur'. Rule absolute (1).

† And so they did entirely, as appears by the report of that case in 1 *Lev.* 255.

(1) *Say. R.* 214. 3 *Wils.* 442. 2 *Bl. R.* 921. *S. C.* acc. This case is cited 1 *Tid.* 575, 977.

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SOUTHHOUSE and ALLEN.

Where it appeared that several sums had been paid between the first day of the Easter and the day of the term where the *latitat* in this cause was sued out, a special memorandum held necessary, and that it ought to be as of the day the writ was returnable.

UPON an affidavit that several sums were paid between the first day of last term, and the day of the term wherein the *latitat* in this cause was sued out;

Kettleby, [for the defendant,] moved that the plaintiff might enter a special memorandum.

And now *Agar*, for plaintiff, comes to shew cause.

Lord *Hardwicke* gone off the Bench.

Probyn, J. There ought to be a special memorandum, and it should be on the day of suing out of the writ, which is the *dies exhibitionis billæ*.

Lee, J. Of a different opinion, viz. That the memorandum should be of the day on which the writ is returnable; for the bill cannot be filed till bail is put in; which cannot be till the return of the writ: and cited 1 *Ventris*, 135: 2 *Leo*. 13.

To which the court agreed, and accordingly the rule was, that the memorandum should be as of the day of the return of the writ (1).

(1) This case is cited 1 *Tid.* 308, 9, of tender made before the exhibiting and the memorandum of the very day of the bill. See 1 *Chitty* on Pleading, the bill was filed was necessary to 201, *et seq.* enable the defendant to support a plea

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2 *Str.* 1020. 2 *Barnard. B. R.* 242. *Fitzgib.* 70. pl. 2.

The Opinion of the Court.

Where from the words of the will, it shall be manifest that others, to the exclusion of the testator's eldest son and heir at law, should take certain rents, parcel of a ground rent issuing out of freehold lands, held, that on the events mentioned in the will happening, the reversion of the land itself passed to the exclusion of the heir.

LORD *Hardwicke*, C. J. This is a writ of error from a judgment given in the Common Pleas, in a feigned action, wherein the plaintiff declared upon a *colloquium* concerning the will of *V. Maudy*; the first count whereof lays that the defendant avers that the testator devised several houses and ground rents mentioned in his will to several persons; and that plaintiff avers he did not devise said ground rents by his will. The second count is, that defendant avers the testator devised the reversions of said houses between *Sarah, Elizabeth, Henry, &c.* Sons and daughters of said testator; and that plaintiff avers he did not devise said reversions; and thereupon two issues were joined: first issue is, Whether testator did devise said rents in manner as alledged by the defendant?

Second issue, Whether the reversions were so devised?

These issues were tried at *Nisi prius* before the late Lord *King*, and on the first, the jury gave a general verdict for defendant; on the

the second they found a special verdict to this effect, viz. They found that before the testator had any thing in the premises, viz. in the year 1688, *A B* and *C*, were seised in fee of *Red Lyon* field, and did demise part of the said field to one *Baker* for 50 years at a pepper corn for the first year, and £29 *per ann.* for the remainder of the term; that they demised another part of the said field to one *Boare*, and another part to one *Chamberlain*; that the said lessees entered; and that afterwards *Chamberlain* made an under-lease of the premises to one *Williams*; that afterwards, viz. in the year 1691, the said lessors being seised of the reversion in fee, did by lease and release convey the reversion of *Chamberlain's* premises to him said *Chamberlain*, and that *Chamberlain* conveyed said reversion to the testator; that afterwards, viz. in 1692, the said lessors did by bargain and sale inrolled, convey the reversion of *Boare* and *Baker's* premises to said testator, and so he became seised in fee of all the reversion, and being so seised he made his will; which the jury find *in hæc verba*, the most material parts hereof are these; he begins his will thus: "In respect of my worldly estate, I dispose thereof as follows;" then he gives several devises to his children, in all of which there are parts of his real and of his personal estate also comprized; he devises to his daughter *Sarah* to her and her heirs for ever £6 *per ann.* being part of £29 ground rent in or near *Red Lyon Square*; * to his daughter *Elizabeth* £—, other part thereof; to his son *Henry* £—, other part thereof; to his son *Benjamin* £—, other part thereof, to his son *Daniel* £—, other part thereof; to his daughter *Mary* £— *per ann.* the remaining part of the ground rent in or near *Red Lyon Square*; "Item," Says the will, "To my undutiful son *Ventris*, in hopes he may reform, £5 *per ann.* on the million bank tickets; and if any of my children die before any of their legacies become payable, the same to be divided between all the rest, except my undutiful son *Ventris*, he being to have no more than what I have before given him, unless all my children should die and he only be living;" and gives his wife the residue, and makes her executrix; so that the residue comprises only his personal estate. They find that the testator died and left four sons, the said *Ventris* being his son and heir, and three daughters; that the said ground having been since built upon is now worth £269 *per ann.* but whether the reversions were devised by the said will in the manner as defendant is said to aver, they refer to the court.

The court of Common Pleas upon this verdict gave judgment for the defendant, and plaintiff has brought his writ of error, and assigned the general error.

The only question in this case is, that which is referred to the court by the jury, and that, as has been rightly said, depends on two considerations; first, Whether it was the testator's intention to devise these reversions. Secondly, Whether such intention may by law have any effect.

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And we are all of opinion that the judgment given by the Common Pleas was well given.

As to the testator's intention, nothing can be plainer; the introduction of the will declares he designed to dispose of all his estate; and such general clauses have been often allowed as proper to expound the particular devises, and though they cannot of themselves disinherit the heir at law without plain words, yet they serve very well to explain the testator's intention; the testator in this will often shews his aversion to his eldest son, and only admits to take at all, in case all his other children should die in his life-time; I admit that negative words in a will, such as "my heir at law shall have nothing," and no devise of the land over to any other, will not disinherit him, but the law will cast the descent on him; but that is not the case here, for the very question here is on the construction of a devise; and in such cases prohibitory clauses have always been allowed to explain the testator's intention; so in *Skinner*, 195, 3 Mod. 45, the devise was thus; "I hear that *John Reeves* is inquiring after my death, but I resolved to give him nothing but what his father *hath given him by will. I give all my estate to my wife," &c. The court held that a fee passed to the wife, relying on the testator's intention appearing by that clause that *John Reeves* should have nothing, and that, therefore, he could take nothing by that will. So in 13 H. VII. c. 3. and *Bro. Abr. Devise*, 52, devise that *J. S.* shall have his land in *D.* after the death of his wife; held a devise for life to the wife by implication; which has been held law ever since, and is so affirmed in *Vaughan*, for 263.

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As to the second consideration; there is some variety of expression in the several devises, but they are all of them devises of parts of the ground rents, and the difference in the expression is immaterial.

It was said that the devises can extend only to the rents then in being, and that the testator might devise the rents without the reversion.

But we are all of opinion, that the will being taken altogether, the words will comprise the reversion, for it is unnatural to suppose he intended to sever them; and all the devises are in fee.

But to get off, it has been endeavoured to construe these devises in two ways, as devises of a rent-charge, the *quantum* thereof to be the apportionment of the ground rent; but it is a very forced construction to say it is a creation of a rent, or at least it is more forced than to construe it a devise of the reversion. The other way was to consider the heir at law a trustee, and compellable in equity to renew the leases, and reserve at least £29 *per ann.* for the devisees; but even that makes an equitable interest in the reversion to pass to the devisees, viz. a trust; and if any interest passes, why should it not be what is most plain and obvious; and besides the rents to be reserved upon such new leases, would not be the specific ground rents devised by the will, so that the words of the will can only be satisfied

satisfied by this construction that we are making; so in the case of *Kerry* and *Derrick*, which is in *Moor.* 771; and *Cro. Jac.* 104; a devise of £10 *per ann.* in *Surry*, or of the rents in *D.* as it is in *Cro.* was held to pass the reversion; it is, indeed, said in *Moor.* that the defendant was advised to bring a writ of error; but that does not, at all, weaken the case with me; for I imagine a writ of error was brought and judgment affirmed; for in *Cro. Jac.* it is reported as a case in the †*King's Bench*, whereas *Moor.* reports it as in the Common Pleas; and the reasoning of the court as it is in *Cro.* holds strongly in this case. So as in *Cro.* it is said, that its actual form for *people to name their land by their rents, we may say here, that it is a common thing for people to mean their inheritance when they speak of their ground rents; and *wills* must be understood according to the common form of expression. *Owen*, 30 (1). So judgment must be affirmed (2).

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† But *quære* that, for in my edition of *Croke* it is entitled in *Communi Banco* in the top of the leaf; and the very next case before it is a case in the Common Pleas, for the names of the judges of that court are but to the opinion given, and so is the next but one after it, for there the prothonotaries are mentioned.

(1) See the case here cited. The word "livelihood" was therein held sufficiently descriptive of lands; and *Brook* said, it was in ancient times used in divers places of this realm, and had been taken for an inheritance: to which *Dyer* agreed.

(2) See 5 T. R. 13. 2 *Doug.* 760, n. [C], where this case is cited, for the point that the intention of the testator to exclude the heir, may be gathered from the whole of the will. As to the general effect of introductory words in

a will, see the cases cited n. (a), 1 *Bos. & Pul.* 562. See also 1 *Bos. & Pul.* 558. 4 *East. R.* 498. 9 *East. R.* 6. 1 N. R. 345. And as to the other point, namely, that a devise of rents is a devise of the estate, see 5 *Mod.* 63. 101, 102. 1 *Salk.* 228. *Comb.* 375. 1 T. R. 193. 2 P. *Wms.* 322. See also 1 *Bro. C. C.* 76, where it was held that a bequest of leasehold ground rents passes not only the reserved rents, but also the reversionary leasehold interest.

GILLAM and STIRRUP.

THIS comes before the court, upon a point reserved at *Nisi prius*; to an action of debt upon a bond the defendant pleaded according to the late act of 2 *Geo. II.* c. 20, which was an act for relief of insolvent debtors; that the said debt was due before the first day of *February*, 1728; and that he was beyond the seas in foreign parts, a fugitive for debt, and that he was a person enabled to return, and that he did return and surrender himself, and was duly discharged according to the said act; plaintiff replied that he was not duly discharged, and put himself on the country; defendant rejoins and plaintiff does the same; and the evidence produced by the defendant was only the duplicate of his discharge by the quarter sessions;

Where the issue was, whether the defendant had been discharged under the insolvent debtors act, 2 *Geo. II.* c. 20, the duplicate of a discharge by the quarter sessions under that act, was held *prima facie* evidence of the fact.

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sessions; and so the question, Whether that be sufficient evidence to maintain his plea.

Marsh, for the defendant. The sessions have, certainly, by the act, a power to discharge, and they are a court of record; and, consequently, their acts ought to be credited, since credit is given to those which are of courts of record: as in *Clewes* and *Bathurst*, 2 *Str.* 961, which was,

A sentence of divorce was allowed as evidence that plaintiff was not his wife; so in *Da Costa & Villa Real*, 2 *Str.* 961, which was at *Guildhall* before Lord *Hardwicke* after *Hill*. term 1738; a sentence of the spiritual court declaring there was no contract of marriage subsisting, was allowed as evidence.

Dennison, for plaintiff. The first act for relief of insolvent debtors was the 22 & 23 *Car.* II. c. 20; which was a little explained by the 30 *Car.* II. c. 4, and, from that time to the 2 & 3 *Ann.* c. 16, no provision was made for the debtors pleading any special plea; and after that act, as appears by the case of *Turner* and *Beale*, *Pas.* 5 *Ann.* in 2 *Salk.* 521: it was not sufficient for the debtor to plead, that he was a prisoner and duly discharged, but it was held that he ought to shew his qualifications, and that he is within the benefit of the act, for that the plaintiff ought to have opportunity of traversing any particular fact; and so it stood till the 10 *Ann.* c. 20, which is the first act that allows the debtor to plead a general plea: but, even that *allows the plaintiff to lay his finger on any particular disqualification of the defendant. The defendant was always obliged to set out one fact, viz. That he was a prisoner at the time prescribed by the act; and that, even, after it was made part of the debtor's oath, for it was not part of his oath till 2 *W.* and *M.* c. 15. The duplicate was first given by the *stat.* 30 *Car.* II. c. 2; and the only intention of that seems to be, to let the defendant free his person upon common bail. The form of the duplicate is not settled by any of the acts, but it is no more than a certificate of his discharge; and before a general plea was allowed to the defendant, it used to be set out in the end of the plea with a *proferet*, as in *Levinz's Ent.* 65; and *Clift's Entr.* 158: but the matters contained therein were not traversable, 3 *Lev.* 190, 151. So that it would not aid a defect in the plea, and it would be evidence of no other fact, but of the act of the justices; for if he was not properly qualified to be discharged, though he was well discharged as to the justices, yet would he not be so as to the creditor. Their certificate is evidence only of his being qualified according to the act of parliament, and the justices are bound thereby to discharge him, though the facts sworn to should be false, but the creditor is not bound by the words of the act, and consequently the certificate alone cannot bind him.

Lord *Hardwicke*, C. J. The general question is, whether the duplicate in this case be a sufficient evidence to prove the plea, and that depends on what is comprised in the replication; viz. whether that must relate to all the matters pleaded so as to take in all the qualifications;

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qualifications; or whether it should relate only to the particular fact of the discharge. If the replication is to be understood to have put all the facts in issue, then I should think it would not be sufficient evidence, because a copy of the act of the justices cannot be evidence of their jurisdiction (1); but if the replication relates only to the fact of the discharge, then this duplicate is sufficient evidence for the defendant; whether it shall relate to one or the other depends on the words of the act, which are that the defendant may plead that the debt was due before ———, &c.; and that he was beyond the seas, &c.; and was duly discharged, without pleading any matter specially: whereto the plaintiff may reply generally, and deny the matters pleaded as aforesaid; or reply any other matter or thing, which may shew the defendant not to be entitled to the benefit of the act. Now here the defendant has pleaded some particular qualifications, and that he was duly discharged according to the act; and replication is that he was not duly discharged: then the question will be what is the meaning of those words in the act, that the plaintiff may reply generally, and deny the matters pleaded; for there is no form set down of such general replication, as there is in the statute of bankrupts a general plea. I say the question is, whether the act impowers the plaintiff to reply in a particular manner, *and take issue on every one of the facts pleaded, for the words, "deny the matters aforesaid," seem to import it, and I have seen pleadings in that manner. But then a further question remains, what is the force of this replication as here pleaded, and how many facts are put in issue by it; and I think the court must take it as a special issue joined on the fact of the discharge; for to make the words, "duly discharged;" in the defendant's plea, to take in all the qualifications, is making all the particulars before set out in the plea to be nugatory; and this construction that I would put on the replication is agreeable to the rule of law in other cases: as in *quo warranto* against one for exercising the office of ——— in a corporation, if the defendant should plead and shew the particular constitution of the corporation, as that a court was to be held, &c.; and many other particulars, and then say that on such a day he was duly elected *per majorum numerum*; and the replication should be that he was not so duly elected; I reckon the only proof requisite on such an issue would be to shew he was duly elected, and that he need not shew the character, &c.; or prove the other particulars in the plea: and this is the fair way of construing it; for as the plaintiff has liberty by the act to take several distinct issues, he ought not to be allowed to involve them all in one general issue.

Lee, J. It was determined here in the Queen's time in the case of *Parker and Whittell* on the statute of the ——— year of her reign, that the duplicate was not conclusive evidence of his being a prisoner in gaol, but that that fact might be examined into notwithstanding,

(1) And see p. 186, *post*, where it is held, that such duplicate was not evidence of any fact which is the foundation of their jurisdiction.

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withstanding, and the certificate was considered only as evidence of it *prima facie*, and so I think here that *prima facie* it is evidence of a due discharge unless something be shewn to the contrary.

Per cur'. Plaintiff is nonsuit, and treble costs awarded to the defendant according to the act(1).

(1) The certificate of the secretary mitted to be read in evidence, 1 Bl. at war of a serjeant's station was per- R. 29.

The KING *versus* The MAYOR, ALDERMEN and
ASSISTANTS of the Town of SHREWSBURY.

2 Str. 1051. Andr. 171, S. C. S. P. 83, 104, 320, S. C. but not S. P.
Ridgw. 46, S. C. 14 Vin. 503. c. 4.

The omission to
summon one
member to a cor-
porate meeting,
avoids the acts
of that meeting.

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UPON a *mandamus* to the defendants to restore C. Kinaston, esq. to the office of alderman of the town of Shrewsbury, they make this return, viz. They set forth their charter, which requires that all the aldermen should be resident within the town, and so continue always, unless some contagious distemper was in the town; and that the next senior alderman should always be from time to time elected mayor: then they set out, that Kinaston was duly elected and sworn an alderman, but had absented himself from the said town for the space of three years, and had resided in places remote and unknown; and that there was no contagious distemper there: that one Floyd, was mayor of the said town; and that in his mayoralty a court of was duly assembled; and it appearing to that court, that the said Kinaston was not abiding in the said town, therefore the mayor, &c. adjudged, that he should be amoved from his office of alderman; and that, accordingly, he was duly amoved from his said office; and therefore they cannot restore him, &c.

Kinaston took several traverses to his return.

1st, He traverses his being in places remote and unknown.

2dly, He traverses the averment of no contagious distemper being there.

3dly, He traverses that Floyd was mayor.

4thly, He traverses that the said court of was duly assembled.

5thly. He traversed that he was duly amoved from his office of alderman.

And the defendants joined issue upon every one of these traverses; and the jury, upon the first issue, find a verdict for the defendants; so likewise as to the second issue: but upon all the other issues, they find a special verdict.

Third

Third issue. They find the charter as set out in the return; and they find, that it was further ordained by the charter, that if a person elected mayor should die, or, refuse the office, before taking the oath, that the like election should be immediately made: or if he should die, or be removed, after elected and sworn, and within the year, that the aldermen, &c. should choose the next senior alderman: and further, that it was ordained by the charter, that for the due and impartial election of a mayor, the senior alderman, who had not been mayor, should be chosen mayor: and if such senior alderman, so elected, should refuse, then the senior next in order after the alderman refusing, should be elected. They find that *Kinaston* on the 25th of *August*, 1732, was the next senior alderman who had not been mayor; but that he did not then, nor had resided in his person, or with his family, in the town for three years before: that *Floyd* was the next senior alderman to *Kinaston*, and that he was, in fact, elected mayor in that year, but that *Kinaston* was at that time senior alderman; and that *Floyd* took the mayor's oath, and was *admitted into the office, and exercised the office for a year without interruption: but whether *Floyd* was mayor at that time of *Kinaston's* motion they refer to the court.

Fourth issue: They find, that *Floyd* being mayor, an assembly was held to do the business of the corporation, but that one Mr. *Corbet* an alderman of the said town, and having then a house and family in the town, was not present at the said assembly, nor was summoned to be there; though the mayor had given the usual and general orders, that the aldermen should be summoned; nor did the summoning officer summon him, or endeavour to summon him, he being informed, and believing him to be out of the summons, and accordingly returned him to be out of summons according to the method used of returning persons that were absent and out of summons: but whether the said court was duly assembled they refer, &c.

Fifth issue: They find that the said assembly did in fact adjudge *Kinaston* to be removed from his office of alderman: but whether he was thereby duly removed they refer to the court, &c.

This cause was argued last term by ——— for Mr. *Kinaston*, and by *Hollings* for the town of *Shrewsbury*; and again this term by *Bootle* for Mr. *Kinaston*, and by *Parker* for *Shrewsbury*. And three questions were made; 1st question, Whether *Floyd* was lawfully chosen a mayor; or, Whether he was only mayor *de facto*?

2dly, If he was only mayor *de facto*, Whether he had power to summon the assembly mentioned in the special verdict? and, Whether he might preside there, and do business, and remove *Kinaston* from his office?

3dly, Supposing he might, Whether the assembly was a legal assembly, all the members not having been summoned?

As to the 1st question, *Kinaston's* counsel argued, that *Floyd* was not a legal mayor; because he was not senior alderman when

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elected, as the charter directs; and that *Kinaston's non-residence* could be no objection to his being chosen, unless the charter had directed that he should be sworn immediately on his election; or, that the charter, or the law, required a mayor to be always present when elected.

As to the 2d question, They admitted, that acts done by officers *de facto*, for the benefit of strangers, are generally valid; because strangers cannot look into their constitution; and so admitted the cases for that purpose of *Leake qui tam* and *Howell, Cro. Eliz.* 533, 1 Co. 140, b. *Popham*, 71, *Dillon and Freame*, and 2 *Leo*. 184, **Hipsley and Tuck*; and such acts in general as are necessary for carrying on the business of the corporation; which necessary acts are such as the officers are compellable to do, or, such as ought in justice and right to be done. But, that acts done for the benefit of the corporation, doubtful whether good, or not, and acts done merely for their own benefit, are void; but none of those are the case here; and admitting officers *de facto* may admit persons, which no case yet has determined, yet it by no means follows that they may displace them too. They cited a case of *The King and Harding*, Hil. 2 Geo. I. wherein an election of a junior counsel for Nottingham by an alderman *de facto*, held not good; *The King and The Corporation of Devizes*, in 4 Geo. I., this question litigated but not determined; and the case of *Hicks v. The Borough of Launceston*, in Roll. Abr. tit. Corporation, let. G. pl. 7.

As to the 3d question, they said, that this assembly being not held on a charter-day, nor a day usual by prescription, all the members should have had notice; which notice, if a general notice, should have been public; and if a private notice, it should have been particularly given to all: that was the opinion of the court at the trial of the cause of *Rumble and Norton*, in 1733. In the case of *The King and The Mayor of Lynn Regis*, in Michaelmas term last, where though it was returned that one of the members kept himself armed, it was not allowed a reason for not summoning him. The case of *The King and The Corporation of Carlisle*, Trin. 5 Geo., held, that if one of the select number be omitted in the summons, they cannot act.

The counsel for the town of *Shrewsbury*, on the first question, cited the case of *The City of Exon versus Glyde*, 4 Mod. 36, that absenting himself disqualifies him, and he was therefore removable by law, though the charter had given directions for that purpose, and *Kinaston* therefore being incapable, *Floyd* was duly elected. They cited *Specot's case*, 5 Co. 58, that such cases as are sufficient to deprive an incumbent are sufficient to refuse him; and the law is the same in this case. They said further, that the election of *Floyd* was an act of necessity, viz. for continuance of the corporation.

As to the second question, they cited *Obrien's case*, Cro. Jac. 554, that all judicial acts done by a bishop *de facto*, as admissions, institutions,

institutions, certificates, and the like, are good. *Cro. Eliz.* 699, *Harris and Jays*, acts of necessity done by them are good; and this was a necessary act, it being their duty to remove him, 1 *Lutw.* 519, *Knight & Ur' versus The Corporation of Wells*; all judicial and ministerial acts done by one by colour of an election, good; 1 *Salk.* 96, acts done by a steward *de facto* under colour and reputation of an authority are good.

*As to third question, a case was cited from Sir *Edward Northey's* common-place books, 1 *Vol.* p. 1135, the case of *Parkinson and Hicks, Hil. 4 W. & M.* in this court, upon a feigned issue, to try if *Hicks* was elected school-master of *Birmingham* school; it appeared that there were thirteen electors, and that a meeting was appointed for the election, and only twelve of them summoned; and his election was held good; the omission of summoning the thirteenth being accident; but, that if the omission had been by practice, their acts would have been bad.

Lord *Hardwicke, C. J.* The determination of this cause will turn on a single point, which is a very plain one, viz. the legality of the assembly in respect of the summons; if that had been properly assembled, we should have been obliged to have considered of the other two points, which are matters of very great consequence; the first of them, to the town of *Shrewsbury* in particular; and the other to all the corporations in *England*. But on the third question I think there is no difficulty at all; it is clear law that where corporate acts are to be done, not on a charter-day, and by a select number, that there must be a summons of every member except such as are absolutely removed from, and have deserted the town; and this has been laid down in great variety of cases; in *Glyde's case, 4 Mod.* 33, and 1 *Shower, 258*, there, the question was not as to the summons of the members that constituted the assembly, but as to a summons of the party himself that was removed; but in both cases the rule is pretty much the law; and my Lord *Holt* lays it down, that when the party is gone to inhabit out of the town, there needs no summons, for that is a deserting. The subsequent cases are *Hil. 1 Geo. I. The King and Strange-ways*; motion for an information *quo warranto* he exercised the office of capital burgess of *Bridport*; and the question was, whether he was duly elected: and the case was much debated; and it was expressly the opinion of Lord *Parker* and the whole court, that when the acts are to be done by a select number, notice must be given of the time of meeting, and that it is to do some corporate act, though what particular act need not be specified: and in such case the acts of a majority would bind the whole body; or if all were present, though by accident and without notice, their acts would be good; but the acts of a majority present by accident would not be binding. The next case was that of *The King and Corporation of Carlisle*, where the power of removal was by charter in the mayor and aldermen, and the whole body was summoned to a general assembly, and the mayor and aldermen afterwards

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wards removed from the rest of the assembly, and removed one *Coulter*; and it was held a bad motion, because they were not summoned to meet as mayor and aldermen; so that point is settled.

*The next question then is, whether here be a good excuse for not summoning Mr. *Kinaston*; the excuse is, that the mayor gave the usual and general order for summoning all the members, and therefore he did his duty, and the subsequent default of the officer ought not to avoid the acts of the assembly; but I don't know how any distinction can be made between the default of the mayor and that of the officer; for, the rule that there must be an actual summons; and be default where it will, if the person who has a right to give his vote is not summoned, the consequence is the same: and though the corporation is, hereby, liable to the officer's neglect, yet the inconvenience of that is not so great, as the inconvenience of the other side would be; for, the corporation themselves may do over again, what shall be faulty by a neglect of their officer: but if it is established to be good acts, it is an inconvenience irretrievable, and open to great collusion. As to the officer's information and belief that Mr. *Kinaston* was out of summons, that neither is in itself an excuse, nor even would itself have been admitted as evidence.

But it was said, that the assembly was regular in what they did, because they ought to credit their officer's return, which was, that Mr. *Corbet* was out of summons; and it is true, that courts of justice are bound to give credit to their returns made by their officers, and their officers may be punished for a false return; but the law can take no notice of the process and return of this assembly; or if we could, it is only a return that he was out of summons, which we cannot understand, unless it had been more certainly explained, as that he was at *London*; even that would not do, because we cannot go on what was said by the officer: but on the other side, the jury have found that he had a house and family in town, which makes an end of all excuses; for, to the purpose of summons, he was thereby resident; and in all the excuses that have been allowed to be good, they have been, that he ceased to be an inhabitant; and in this very case, the residence required by the charter, is to reside by himself, or his family; and the return made by the defendants as to *Kinaston's* residence, is, that he was not residing by himself or his family: so that the verdict has sufficiently found Mr. *Corbet* to be resident, in finding that he had a house and family there: and if that were not found, it would be still uncertain, whether he had deserted or not; and in that case the court would not allow the return, but must grant a peremptory *mandamus* (1).

As to the case cited from Mr. *Northey's* common-place book, every note of that sort cannot be relied on: but however that case either is not law, or comes not up to the present case; for it don't appear

(1) See 1 Doug. 149.

appear to be more than an *obiter dictum*; and that was the case of a private charity.

*It never has been held necessary, to find a fraud or design of not summoning.

Tot' cur' accord', so they awarded a peremptory *mandamus* (1).

Reversed by Lords 1737, as there was no finding of damages; nor, judgment for any. *Lib. B.* 161(2).

(1) 1 *Kid* on Corporations, 436, but as to where the whole body being summoned, a select body may, without other summons proceed to an election vested in such body, see 8 *East R.* 543.

(2) The case is also reported, 2 *Str.* 1051, but the questions upon which the judgment of *B. R.* was reversed by the Lords, are there stated at length. They relate in substance to the points

so briefly mentioned above, and the Lords having awarded a *venire de novo*, all mention of which is omitted in the present report, cases are cited to that point, see 2 *Str.* 1053, n. 2. 2 *Br. P. C.* 271; also, *post*, 295. 377, *S. C. And.* 85. 104. 320. 2 *Kyd* on Corporations, 367, *S. C.* See also 2 *Doug.* 731, and n. [† 157.] *id.* 732. 1 *T. R.* 528. 1 *Cowp.* 89.

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ALDERMEN and
ASSISTANTS
of the Town of
SHREWSBURY.
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ELLIS and MORTIMER.

SCP fac' upon an old judgment of the time of *W. & M.*

Parker, for the defendant, who is the terre-tenant, moves for leave to plead double, viz. payment of the money recovered; and that the defendant in that judgment was not seised; he cites Sir *F. Child's* case, where the Common Pleas allowed the same about five or six years ago.

Cur'. You need not quote cases, we have gone a great way further. Be it so (3).

(3) The statute for the amendment of the law, 4 *Ann. c.* 16, makes no exception as to pleading double in *sci. fa.* The words are, "the defendant or tenant in any action or suit, or any plaintiff in replevin in any court of

record, may, with leave of the same court, plead as many several matters thereto as he shall think necessary for his defence," s. 4. S. 7 excepts penal actions. See *post*, 262.

In *sci. fa.* against a terre-tenant, the defendant may plead double.

The KING versus The MAYOR and BURGESSES of DERBY.

The Opinion of the Court.

LORD Hardwicke, C. J. This is a *mandamus* directed to the mayor and aldermen of *Derby*, bearing teste the 14th of

June

Although it be undecided whether a burgess having committed an offence indictable

at common law, together with a breach of his oath and duty, can be disfranchised previously to conviction of the indictable offence, yet if it appear that an indictment would not have determined the matter, he may be disfranchised for the acts amounting to a breach of his oath and duty.

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June last, and returnable the first return of *Trinity* term, commanding them to restore *Samuel Sadler* to be freeman of that borough; to which they have returned, that this was an antient borough by the name of bailiff and burgesses; that by a charter 18 Car. I. they were to have a mayor, and be called by the name of mayor and burgesses. That the mayor, aldermen, and fourteen capital burgesses are a common council, and may make bye-laws, and let the lands and transact the affairs of the corporation. That the mayor, &c. in common council may from time to time, for misbehaviour, displace the common council-men from their offices, and may amove burgesses from being freemen. That *Sadler* was duly sworn and admitted a burgess, and took oath, which is to be true to the Queen, and to aid and assist the mayor, &c. and to be obedient to them in all lawful commands, and to observe such rules and orders as should be made *by the common council for the good government of the corporation, and to yield and contribute to the good of the corporation as far as he was able, and to uphold all the liberties thereof, &c. That on the 14th of October, 1718, the mayor, aldermen, and capital burgesses were assembled in common council, in the *Guildhall* of the town, to consult about the common good of the corporation, and being so then assembled, the said *Sadler*, and several other persons, contrary to his oath, and the duty of his office, in sight of the mayor, aldermen and common council, riotously assembled in the street over against the common-hall, to the disturbance of the common council, and did then and there assault the constables appointed to keep the peace, and did then and there assault *F. Cockayne*, esq. an alderman and justice of the peace of the said borough, as he was going to the common hall, and prevented him from going to the business of the corporation, and did terrify, assault, and hinder several other persons from going to the common hall: and though the mayor made proclamation for them to depart, *Sadler* made a great noise and shouting, to deter and hinder the cryer from making the proclamation, and would not depart, and with great shouts did hinder the mayor in the business aforesaid. That *Sadler*, thereupon, was summoned to appear and shew cause at the next common council why he should not be disfranchised; that afterwards the common council met and continued assembled for two hours, and because *Sadler* did not appear, nor shew cause to the contrary, they ordered he should be disfranchised, and that he was disfranchised accordingly, and therefore they cannot restore him.

Several exceptions were taken to this return: but all of them were over-ruled but one, viz. that what they have returned is a crime indictable at law, and therefore he should have been convicted by a jury, before they could proceed to disfranchise him.

But on full consideration we are all of opinion, that the cause here returned is sufficient grounds for his disfranchisement without any prior conviction,

The

The general grounds of disfranchisement, as it *Bagg's* case, 11 Rep. 98, 99, are first such offences as are against his oath, and the duty of his office, and to the prejudice of the corporation, and such are breaches of the trust and condition annexed to his office, and for them there is no need of a conviction, but the corporation may proceed to disfranchise him in the first instance. 2dly, Such misbehaviour as are general offences, and which render him infamous, as *perjury*, *forgery*, &c. and in such cases it is the loss of credit, which is the ground of his forfeiture; and therefore conviction, *which is the ground of his infamy, ought to precede the disfranchisement. This was intimated in *Bagg's* case (1), and was adjudged in *Lane's* case, Hil. 8. Q. Ann.†, *Lane* wrote a scandalous libel on the mayor and sent it to him, and he was for that removed; and the removal was held bad, being like the case of *perjury* or *forgery*; and *Holt* said that it was not proper to try whether he was guilty of such an offence in an action for a false return. The third species partakes of both the others, viz. a breach of oath and duty, and an offence at common law mixed together; and as to this last species there has been great diversity of opinion, and what is said in point of *Bagg's* case, that if the party be convict of an offence against his duty, and to the prejudice of the corporation, it is good cause to remove him, seems to imply that a previous conviction is necessary; but it is not so, for if the whole paragraph be considered, it is plainly spoken only of such cases, where there is no power of amotion. The case of *The King and The Mayor of Wilton, Michaelmas, 8 Will. III.* (2). The return was, that the corporation might remove for just cause on proof of the offence, and that *Chalk* had raised the books of the corporation; in an imperfect note of this cause in *Comberbach*, 396. *Holt* says, that for *perjury*, *forgery*, &c. he is not to be removed before conviction; but raising the corporation books is not only an offence at common law, but against the duty of his place; but then says the book, *Northey* urging *Bagg's* case, *Holt* *hesitavit*; and it was adjourned; but I think *Bagg's* case is of little weight as to this point; and according to a note I have of that case in *Hilary* term, afterwards a peremptory *mandamus* was awarded, upon the other defects in the return, and no judgment given upon this point. *The Queen and The Mayor of Newcastle*, commonly called *Parrot's* case, *Michaelmas 8 Q. Anne*, *mandamus* to restore to the office of alderman; return, that he corruptly bribed one of the burgesses to vote for a member of parliament; and held to be a good cause of disfranchisement if there were a precedent conviction; and so it rested, for I do not find it was determined. *The King*

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† 1 Ld. Raym. 1304, [S. C.] Fortesc. Rep. 200. 275. 11 Mod. 270, [S. C. but differently reported.]

(1) 1 Roll. Rep. 224.

(2) 1 Ld. Raym. 225. More at large, 5 Mod. 257. 2 Salk. 422.

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King and The Aldermen of Carlisle, 8 Mod. 99. *Fortesc. Rep.* 200, *Michaelmas*, 1 Geo. I. *Mandamus* to restore a freeman of *Carlisle*; return, that he corruptly gave money to one of the corporation to vote for a mayor; and on that return the court was equally divided; *Id.* Ch. J. *Pratt*, and Mr. Justice *Powell* held that a precedent conviction was necessary, but Mr. Justice *Eyre*, and Mr. Justice [*Fortescue*], were of a contrary opinion; and they held that for things that are merely offences against the common law a precedent conviction is necessary; because, in such case, the removal is solely on account of the party's infamy; but that, for an action prejudicial to the corporation, as well as contrary to the common law, the party might be disfranchised without a prior conviction, and so that case rested; so that it is hitherto quite unsettled, and it being a point of consequence, it is *not fit to be settled till it comes directly before the court. But in this case, there are offences against his duty returned; for the true ground of his forfeiture in this case is, that he endeavoured to hinder one of the aldermen from attending the common council, and hindered others from going thither to do their business, and refused to depart at the command of the mayor signified by the crier: and the riot is but a circumstance attending his breach of duty; for he might have been not guilty and acquitted of the riot upon an indictment, and have been guilty of a breach of his duty; or, he might have been guilty and convicted of the riot, and yet have been innocent of a breach of his duty to the corporation; so that as an indictment would not have determined the matter, it would have been vain and nugatory: and the case of *Chalk* is different; for there he could not be guilty of an offence against law, but at the same time it must have been a breach of his duty: and to this purpose *Haddocks's case*, *Raymond*, 435; is in point; where the offence returned was mixed with a riot for which he might be indicted, and yet the return held good.

So we think too that this return must be allowed (1).

(1) See 2 *Barnard*. 301, 302; also 2 *Kyd* on Corporations, s. 9, also p. 91. But as to where a corporator does not lose his franchise, nor the court of K. B. grant an information, until a sentence of amotion shall have been pronounced against him by the corporation, see 2 T. R. 772; see also 13 *East*. R. 367. And for the causes of amotion, see 11 *Rep.* 95 b. *Cartl.* 176. 1 *Burr.* 538. 2 *Sid.* 209. *Doug.* 80.

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ELLIS *versus* SOUTH and Others.

TRESPASS: *Parker*, moves for a rule for a view, on an affidavit that it will be a better direction to the jury, than any evidence that can be produced. Granted (1). Rule for a view granted on affidavit as to its utility.

(1) The practice relating to view is founded upon the statutes 4 Ann. c. 16. & 7. 3 Geo. II. c. 25. s. 14. In trespass in K.B. the rule for a view is laid up on counsel's hand: but in other actions it is moved for in court; and in some cases it is only a rule to shew cause, 1 Tid. 485. For a concise history of the practice, together with the details of the practice and forms, see Pr. Dict. title View.

MICHAELMAS TERM,

9 Geo. II. 1735. B. R.

PHILIP Lord HARDWICKE, Lord Chief Justice.
 Sir FRANCIS PAGE, Knt.
 Sir EDMUND PROBYN, Knt. } Justices.
 WILLIAM LEE, Esq.
 JOHN WILLES, Esq. Attorney-general.
 DUDLEY RYDER, Esq. Solicitor-general.

LOCKWOOD and BEAUMONT.

Where the judgment by default, is regularly signed, the court will not set it aside on the ground of a release of the debt before action brought.

KETTLEBY moved to set aside a judgment, for that before the action brought, the defendant had paid the debt to one *A*, who gave him a release, and, afterwards, assigned the debt to the present plaintiff; but could assign no irregularity or surprise in the signing this judgment: for the defendant, instead of appearing and pleading the release, let judgment go against him by default, and through negligence.

Lord *Hardwicke*, C. J. We do, sometimes, upon payment of costs, set aside judgments that are strictly regular, if the judgment has been obtained by surprise; and do let the parties in to try the merits, but never as this case is, where the judgment is regular and no surprise, so we can make no rule (1).

(1) And in this case, although a release had been given, *audita querela* would not lie; since it is a rule that where the party had time to take advantage of the matter, which he has in discharge of himself, and neglected it, he cannot afterwards be relieved by *audita querela*. 1 Roll. Abr. 306, (C), pl. 1. See 1 *Wms. Sessd.* 148 a. n.

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The KING *versus* DUFFIN.

LORD *Hardwicke*, C. J. In striking special juries, if one party does not attend, it is for the master to settle the forty-eight; then the attorney of that side which attends, strikes off twelve, and the Master strikes off other twelve in behalf of that side which does not attend (1).

Mode of striking a special jury in the absence of one party.

Upon an application for enlarging a rule for an attorney's answering the matter of an affidavit, Lord *Hardwicke* said, and the court agreed, that the rule of court is (2), that affidavits ought to be filed (in this case the affidavits were taken before commissioners in the country) before they can be read; and that to be done the day before (3); for they are read as copies of the records of the court: and they are so esteemed records as that every subject of *England* has a right to take copies of them: and they ought also to be filed, that copies may be made, or else the crown is defrauded of the stamp-duties (4).

Affidavits must be filed in time. They are records of the court, and every subject has a right to a copy of them.

(1) See R. T. 8 *Will.* III. B. R. "made and delivered to the party

(2) Probably R. M. 9 Geo. II. is "filing the same."

(3) The rule says, "in such convenient time, that copies may be duly
(4) Further, as to filing affidavits, see *Peacock's Rules and Orders, K.B.*; 1811, Index, title AFFIDAVITS.

The KING *versus* ENGLAND.

UPON Mr. *Yate's* motion, the court discharged the defendant's recognizance upon his producing the prosecutor's consent verified by affidavit (5).

Recognizance discharged upon producing the prosecutor's consent, verified by affidavit.

(5) See p. 98, *ante*.

FULLER and JOHNSON.

2 *Str.* 882, cited by *Andr.* 54. 309. *Barnard. K. B.* 357, 258. 404.

BENNY moved in behalf of an executor to set aside a judgment signed against his testator, upon a warrant of attorney given by the testator, for that the testator died on the same day on which the judgment was signed, but before it was signed, viz. at four or five o'clock in the morning.

But the court refused to do it. And

Where the party having given a warrant of attorney, dies the same day the judgment was signed, and before the signing, it shall not be set aside.

Lord

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Lord Hardwicke, C. J. said, it was just *Shelly's* case in the 1st report (1), where a recovery passed the first day of the term, though the recoverer died that very morning at three or four o'clock, was held good. *And he mentioned *Woodward's* case †, which went a good way further, for there he gave a warrant of attorney to enter judgment, and died within a year after in time of vacation; the attorney entered up judgment of the preceding term to his death, for he died in vacation, and the court would not set it aside. No rule (2).

† *Woodward's* case is in 7 *Mod.* 203. living, is, that if he enters it after the *Salk.* 87, and in 7 *Mod.* 94, *Holt* says, year, he must enter it as of the term that the reason why after the year judgment cannot be entered without leave in which he has leave, but within the of the court, which cannot be had year he may enter it of a precedent without affidavit that the parties are term.

(1) [88].

(2) See also 2 *Str.* 1081. *Cooke's R.*11. 6 *T. R.* 368. 12 *Mod.* 5. 1 *Bee.* and *Pul.* 571.

The KING versus The INHABITANTS of CHEDINFOLD.

After rule to shew cause why an information for not repairing a road is granted, but with a view to afford time for repair, retained, the road must be substantially, not partially, mended, otherwise the rule will be made absolute.

IN *Easter* term last, *Lacy* moved for an information against the defendants for not repairing the roads, and a rule was made to shew cause, but the court would not make it absolute, but retained it to give them an opportunity of mending them this summer. And now

Filmer comes to shew cause, and produces an affidavit that they have filled up the bad part with fagots covered with earth, which though it is not quite sufficient mending is as much as this last wet summer would allow of.

On the other side affidavits were produced that they might have had stone from a quarry within two miles, from whence the neighbouring parishes fetch materials for their roads.

Cur' did not think the parish the defendants in earnest in mending their roads; and therefore and for the example sake the rule was made absolute.

The KING versus JAMES.

Costs allowed upon an information for not going to trial.

LACY in behalf of the defendant moves for costs for not going on to trial. The prosecutor in an information in *B. R.* ought to bring the cause to a trial at his own costs; but in an indictment, which is solely at the suit of the Queen, he that is indicted must bring the cause to a trial at his own charges. *Styles Pract. Reg. tit. Trial*, p. 604.

Per.

Per cur' referred to a master (1).

N. B. Masterman says, By the course of the court, costs for not going to trial are allowed in suits of this sort as well as civil (2).

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The KING
versus
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(1) 3 *Burr.* 1304. 1 *Bl. R.* 356, S. C. and S. P. See also p. 247, *post*, *Comb.* 325. 419. But the executor is not liable to these costs, 2 *Str.* 874. 1 *Barnard.* 335, 338, S. C. See also 2 *Hul. L. C.* 590, 2d edit.

(2) The case is very loosely reported, but it is presumed the application for costs was made after notice of, and for not proceeding to trial. It may be observed, that if the defendant be acquitted, he is not entitled under 4 and 5 *W. and M. c.* 18. s. 2, to costs beyond the extent of the recognizance entered into by the prosecutor in 20*l.* under

that act. *The King v. Fildwood*, 2 *T. R.* 145. And the court on granting an information will not require the prosecutor to give security for the costs, in case the defendant should be acquitted beyond the extent of the recognizance of 20*l.* required by that act. *The King v. R. Brooks* and others, *id.* 190. See also 1 *Str.* 33. 2 *id.* 1042. *Hawk. P. C.* 119. But if the relator does not proceed to trial pursuant to notice, it is within the equity of stat. 9 *Ann. c.* 20, that he should pay costs. *Anony. Say. Rep.* 130. See p. 249, *n. post*.

*The KING versus HOLLAND.

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CHUTE, last term, moved for an attachment against the defendant, for a contempt in not obeying an order of the quarter-sessions which was removed into this court and confirmed; the order was, that the defendant who was convicted of being the father of a bastard child, should pay so much a week for its maintenance, and an arrear of 20 weeks being demanded he refused to pay it; and the court would only grant a rule to shew cause, because they said it was not like a refusal to pay costs taxed.

Rule to shew cause why an attachment should not issue for not obeying an order of sessions confirmed in *K. B.* made absolute.

And this term the cause shewn being insufficient, the rule was made absolute, but the attachment was ordered to lie in the sheriff's hands for a week, that he may have an opportunity of paying, if he will (1).

(1) 1 *Ld. Raym.* 676. 2 *Ld. Raym.* 858, *acc.*

DUBBER versus TROLLOP.

Rob. Gav. K. 96, S. C.

A REMAINDER was devised to the testator's son for life, and his heirs male, and several remainders over: and the heir of one of these remainder-men, being plaintiff in ejectment in the Common

Devise to the testator's son for life, and his heirs male, with remainders over, held, that the

words, "heirs male," were to be understood collectively, and that one taking in remainder, took an estate tail.

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mon Pleas, judgment was given upon a special verdict for the defendant; and upon a writ of error, in this court, the only question was, as below in the Common Pleas, whether these words in the will do make an estate tail in the testator's son, or only an estate for life; the opinion of the court below was that it was an estate tail.

Serjeant *Hawkins*, in *Easter* term last argued for the plaintiff in error, That it was only an estate for life; and cited 6 Co. 17. b, *Wild's* case. Co. Lit. 8. b. 1 Co. 63, *Archer's* case. 1 Co. 104, *Shelly's* case. Moor. 397, *Richardson* and *Yardley*. Cro. Eliz. 40, *Lovelace* and *Lovelace*; and S. C. 2 Leon. 35. 1 *Bulstrode*, 219, *Whiting* and *Wilkins*; and S. C. in 1 Roll. Abr. 836, pl. 11. *Styles*, 249, *Bawsey* and *Lowdall*, S. C. 2 Roll. Abr. 253.

Serjeant *Belfield* for defendant in error, cited likewise for his side of the argument, *Styles*, 249. 1 *Bulstrode*, 219.

Serjeant *Hawkins* also remarked that he had searched for *Burley's* case, which is cited 1 *Ventris*, 230, and finds it to be *Trin* 43 *Elin* Roll. 1435; and, there, no devise at all is mentioned.

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*And at that argument *per Lord Hardwicke*. Notwithstanding there is an express limitation to *Thomas* for life, yet, if afterwards there is a limitation, or what amounts to it, to the heir of his body, it will unite the inheritance to the estate for life, as was the resolution in [*Burley's*] case? (1). Then the question will be, whether the word *male*, being added, will make any difference: and, if [the construction] stood on that only, I should think not, but take the word *heir*, to be *nomen collectivum*, because there is no limitation after the heir male, as there was in *Archer's* case: then the question will be, what alteration the word *first*, makes; and that, I think, must be taken *secundum subjectam materiam*; so that it may mean only and absolutely the first, or it may mean the first from time to time in order of succession; and if the words are capable of this last construction, the question is, which is most agreeable to the testator's intention. And he inclined his intention was for the last construction.

And now this term, without any argument, judgment was affirmed; and

Lord *Hardwicke*, C. J. said, he thought it a plain case; and cited the case of *Miller* and *Seagrave*, *Michaelmas*, 10 Geo. in C. B. (2), where a devise was to Serjeant *Miller* and *Charrock* his wife for life, remainder to the next heir male of their bodies; and the court held, that if the word *heir male* be in, no addition of first, next, right, &c. makes any variation, but it will go in a course of descent, unless there are other words, viz. words of purchase, and not of limitation, as in *Archer's* case. He cited 8 Roll. Abr. 832, let K. where land given, even in a grant to a man and his heir, passes a fee; because the word is *nomen collectivum*.

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(1) Cited above from 1 Vent. 230.

(2) Rob. Gavelkind, 96.

Page and *Lee*, J. J. of the same opinion clearly; and *Lee*, J. mentioned a case cited by Lord *Hale* in 1 *Ventris*, 230 (1), where the words were next heir male, and determined to make an estate tail; and he observed that this case is stronger than that, because of the words which follow, viz. for want of heir male, which are restrictive.

Judgment affirmed (2).

(1) *Barley's* case, before cited, *arguendo* by *Hawkins*, Serjeant.

(2) This case, and that of *Seagrave v. Miller*, mentioned above by Lord *Hardwicke*, C. J. appear to be first reported by Mr. *Robinson*, in his valuable *Treatise of Gavelkind*, published in 1741, long previously to the publishing of these reports in 1771. In Mr. *Robinson's* report the devise is more fully stated than here; and Mr. *Fearne* cites these cases from the *Treatise of Gavelkind*. See *Fearne* by *Butler*, pa. 179, 5th edit. And it should

seem that the present report is extremely wanting in accuracy in a most important point, namely, in respect of whether the words of the devise were "heirs male" in the plural, or "heir male" in the singular. According to Mr. *Robinson's* report the words in the devise upon which the question hinged, were "heir male," and it is upon those words that Mr. *Fearne loc. cit.* reads; whereas the words of the devise above stated in the principal case are "heirs male." See *Fearne ubi supra*, and 1 *Atk.* 411.

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PRATT and SALT.

ALL matters in difference were by rule of *Nisi prius*, referred to arbitrators, who awarded, among other things, that the defendant should pay the plaintiff's attorney three full fourth parts of the costs, to be taxed by the Master; and now

**Gapper* applies for the court's direction to the secondary in his taxing costs, whether to tax them as between attorney and client, or as between party and party.

Lord *Hardwicke*, C. J. I see no reason or ground for taxing these costs as between attorney and client; for if the cause had gone on, and the plaintiff had had a judgment of the court, the costs must then have been taxed as between party and party; and why should it be otherwise where the parties have chosen their own judges, unless the arbitrators had expressly so awarded, as that the plaintiff should have all his expences, or such like expression, &c.

Cur' accord', And costs allowed as between party and party (3).

(3) Cited 2 *Tid.* 826, edit. 1812. Notwithstanding the latter part of this decision it has been determined that an arbitrator under an order of N. P. can

award no other costs than as between party and party. 3 *Cowp.* 127. *Cooke's R.* 70. 8. P. See also 2 *Bl. R.* 953.

Where an arbitrator under an order of *Nisi prius*, awards costs, it shall be understood as between party and party; not as between attorney and client, unless it be so awarded.

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BERRINGTON at the Demise of DORMER *versus*
PARKHURST, FORTESCUE, and Others.

Tri. at Ni. Pri. 4to. 23. S. C. S. P. (1).

Motion to
strike out a de-
fendant in eject-
ment, he being
a material wit-
ness, refused.

IN ejectment; the parties are at issue, and the cause is to be tried at the bar to-morrow; and yesterday it was moved on the part of the defendant, that *Edgerly* one of the defendants may be struck out from being a defendant, upon an affidavit of the said *Edgerly*; that he was only steward to Sir *John Fortescue* one of the defendants, and not a tenant, nor claims any interest in the premises; and an affidavit of the other defendants that he is a material witness. To support the motion they cited an anonymous case, 1 *Sid.* 24, where, after declaration delivered, and before plea, he who had title moved to change the plaintiff, and the court agreed he should paying costs: and there is a note of the reporter; the plaintiff may be changed for the same reason that the defendant may. They cited also 1 *Sid.* 441. in trespass against several defendants, one of the plaintiff's witnesses, was by mistake made a defendant, and on motion he was struck out.

And now at shewing cause plaintiff's counsel produce an affidavit, that the said *Edgerly* was at the time of serving the ejectment a tenant in possession of a messuage, part of the premises in demand; and they cite a case of *James and Kent*, *Hil.* 6 *Geo.* II.; where, upon a motion that *Kent* the tenant in possession might be struck out and the landlord added a defendant, the court said, you may add the landlord, if you will, but you cannot strike out the defendant; it would be of dangerous consequence: it never was, nor could be done.

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*In reply, defendant's counsel cited 3 *Lev.* 347, *Bearcroft* with the hundred of *Burnham*, where the declaration was amended in a very material part even after the jury were come to the bar. They cited also, a case of *Lord Montague and Sir Geo. Murwell*, *Pas.* 3 *Geo.* I. a motion that the fictitious defendant might be struck out and made a witness on an affidavit that he had no interest; and it being an issue directed from the court of Chancery, they were directed to move the Lord Chancellor. 1 *Sid.* 315, *Stephens and Gerrard* was also cited, where upon a trial, in order to take off a witness's evidence, they shewed he was tenant in possession, and therefore liable for the mesne profits; and yet the court allowed him to be a witness.

Lord Hardwicke, C. J. The question is, whether we can leave one of the defendants out of the record and jury process at the instance of the defendants; for we must take this application to be,
not

(1) The case as to other points appears in several books, viz. 2 *Str.* 1086. *And.* 125. 2 *Kel.* 98, 99. 2 *Barnard.* 217. 2 *Doug.* 484.

not at the instance of *Edgerly*, but of the other defendants, because they swear that he is a material witness for them; now the cases that have been cited to support this application do not come up to it. As to the case in *Levinz*, it is not a case of this kind, for it was only as to making an amendment, which is always at the court's discretion, and not an alteration of parties; and the reason of amending in that case was, because otherwise the plaintiff must have entirely lost his action. The case in *Sid. 24*, does not come up to this case neither; for, there it is an application on the behalf of the plaintiff, and before plea pleaded, to alter a plaintiff who is always a fictitious person, and is not, therefore, material to the defendants, the lessor of the plaintiff being answerable for costs. But the landlord, and the tenants of the land are real defendants, one for his possession, and the other for his title: and the meaning of the remark at the end of the case is, that the nominal defendant, viz. the casual ejector, may be changed as well as the nominal plaintiff. As to 1 *Sid. 441*; that was an action of trespass, where no possession is to be recovered, but only damages: and the application there too, was in behalf of the plaintiff who has a power to enter a *nolle prosequi*, as to any of the defendants, so that the court only granted that upon motion which the plaintiff was entitled to have done himself in another way. And there was a case, which I have from the information of Lord *Raymond*; an information was exhibited at the suit of the crown against several defendants, and *Trevor* Attorney-General would have examined one of the defendants as a witness against the other defendants, but the defendants would not suffer it to be done, because the crown was precluded in having made them all defendants, and thereupon the Attorney-General entered a *nolle prosequi* at the bar, and was then suffered to examine him.

*The reason for our doing this, because, otherwise, the defendants will be prejudiced in wanting a material witness: but that proves too much, because in most [cases of ejectment] the tenants in possession are material witnesses for their landlord.

It was said, also, that here, the defendant *Edgerly* is not a tenant in possession, but a servant only, of one of the defendants; but how does that appear to us, since there is no complaint that the ejectment was ill served; and service of an ejectment on a servant is not good service; as was solemnly determined, *Douglas's* case, *Michaelmas*, 10 *Geo. I.*; there the servant was served on the master's absconding; and the court thought that not sufficient to found the common rule upon, though indeed upon the affidavit of that absconding of the master, they did make a rule that leaving the declaration with the servant should be good service of the master; therefore, if in our case, the said *Edgerly* was only a servant and not a tenant, the proper method would have been to move to set aside the rule as to him. Besides, the defendant *Fortescue*, whose servant he is said to be, has joined himself a defendant as being his landlord, which is an admission that he was tenant in possession;

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and if we could make a new precedent for this case, it ought to be on the clearest grounds possible; whereas *Edgerly* only swears he is not a tenant, and does not swear he is not tenant in possession; and he allows he is a servant of Sir *John Fortescue*, and lives in his house with his family; and if that be so, whom else could the plaintiff serve his ejectment on? For such a case differs from service on a servant living in the same house with and under his master; even supposing this to be the case, and they come to set aside the rule for want of service on the tenant in possession. I should have thought this sufficient service, because he could appear to the plaintiff to be so. Besides, they do not shew that any one else is tenant in possession, so I think the rule must be discharged.

Page, J. I do not know any case where the defendant at his own motion can abridge plaintiff's action. The case in 1 *Sid.* 315, is to the contrary; for if this court could have done it, they would not have sent him back into Chancery. I do not remember but that every motion by the defendant to strike out the defendant and put the landlord in his room, has been refused: but the court will, at the defendant's request, take in the landlord to be a defendant.

Probyn, J. The plaintiff may enter a *nolle prosequi*, as I apprehend, even without the leave of the court. If the court should strike out the defendant in this case, not only the record must be altered, but all the *subpoena's* of witnesses, and the jury process; so that if the *jurors or witnesses should not appear upon the process already gone out, they would not be punished, being summoned in a different cause from what will be on record.

Lee, J. The only ground this can be put upon is, that this defendant *Edgerly* was irregularly served, being a servant only and not a tenant in possession: now we have not before us the rule for judgment against the casual ejector; and therefore we must take it for granted, that there was a good affidavit of his being tenant in possession; and if the fact is really otherwise, the affidavit was false; but here, besides that express affidavit, he is admitted to be tenant in possession, the ouster being confessed; therefore I do not see how we can go into this enquiry upon this affidavit. I do not see how the court can strike out a defendant in case of ejectment any more than in any other case; and I do not know any case where it can be done without plaintiff's consent, for plaintiff may always proceed at the peril of costs. Rule discharged.

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A CERTIORARI upon *Clive's* motion granted at the instance of the prosecutor to remove an indictment for a riot from the court of grand sessions for the county of *Brecon* (1).

Certiorari granted at the instance of a prosecutor to remove an indictment for a riot from the court of great sessions for *Brecknock*.

(1) On the part of the prosecutor special ground must be laid. See 4 this is a motion of course, but when *Burr.* 2458. Also 1 *East. R.* 304, n. moved on that of the defendant, a

DOVEY *qui tam* versus POWEL.

IN an action *qui tam* upon one of the stamp acts, *Hopkins* moved upon the common affidavit to change the *venue* from *Middlesex* to *Monmouthshire*. *Venue* changed in an action *qui tam*.

Draper opposed it a little, as being an action of debt.

Lord Hardwicke, C. J. In actions of debt upon specialty, indeed we refuse to change the *venue* (2): but I do not know that this is against the course of the court. Be it so.

(2) See the authorities cited 1 *Tid.* 7 T. R. 82, 1 T. R. 781. See also 1 604. unless upon special ground, *Pole Bos.* and *Pul.* 423. 3 *East. R.* 329. 8 v. *Horobin, M.* 22 *Geo.* III. K. B. cited *East. R.* 268.

THRUSTOUT on Demise of TURNER versus GRAY.

2 *Str.* 1056, S. C. but not S. P. Com. Dig. Pleading, (4Z. 4.)

DENNISON move^d to enlarge the time of the demise (3).

Lord Hardwicke, C. J.: Will the other side consent?

Marriot did consent; and it was ruled accordingly.

N. B. It cannot be done without consent. So ruled, 1 *Salk.* 257.

In ejectment the time of the demise may be enlarged by consent.

(3) But see 4 *Bur.* 2447. 2 *Bl. R.* in respect of the form, were allowed 940. 2 *Cowp.* 841. where amendments on payment of costs.

*BAKER and THOMPSON.

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EJECTMENT in *B. R.* in *Ireland*, and verdict and judgment for the plaintiff. Upon a writ of error, *Parker* excepts, that it does not appear on this record, that the cause which was tried

Although the record omit to state that the cause was tried before justices assigned to hold

the assizes, in and for, &c. yet if it appears by the award of the venire, that they were called "justices of assize," it is sufficient.

Where in ejectment the premises were described to lie in *vill et terr. de A.* the words "*et terr.*" shall be rejected, and then "*in vill*" alone, held well enough.

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before judges of assize was duly tried; for they are not described to be so, for it is only said to be *coram* *St. Leger* and *R. Jocelyn just' & commissionar' Domini Regis in & pro cum' præd' ad capiend' juxta formam statut.* whereas it ought to have been *ad capiend' assisas*, and to support this exception, he cited 1 *Saunders*, 263; where a conviction before justices of peace, which was said to be *coram T. B. and G. B. ar' duob' justic' domini Regis ad pacem in com' prædict' conservand'*, omitted *assignat'*; for which omission it was quashed. He took another exception, for that it does not appear where the lands lie, they being said to be in *vill' et terr' de A.* which word *terr'* is of too uncertain a signification.

But this last exception was immediately over-ruled, for Lord *Hardwicke*, C. J. said, the word *terr'* might be rejected, and the description in *vill'* alone is well enough. But on the other exception, it was ordered to stand over, for, Lord *Hardwicke*, C. J. said, perhaps they may set it right in *Ireland*.

But, being again brought in the paper this day,

Filmer, for the defendant in error, gave this answer; that the award of the *venire* upon the roll is, *nisi* the justices of assize for the King's county shall come, &c. and the record goes on *et præfat' justic' ad assisas coram quibus, &c. recis. hic record' coram eis habet'*, &c. and then comes the record wherein is the omission; so that here is an affirmation of the court that it came from justices of assize.

Lord *Hardwicke*, C. J. I think this is an answer; and, as it is now recorded by the court below, that it was a record sent up from justices of assize, for us to allow an assignment of errors that the cause was not tried before justices of assize, would be to allow an assignment to contradict the record below.

Lee, J. By reason of omitting the word *assignat'* in the case in *Saunders* (1), it did not appear that they were justices of peace, and had jurisdiction. Judgment affirmed.

(1) 1 *Saund.* 263.

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*METCALF and ROE.

Andr. R. 107, S. C.

Ejectment for
cattle-gates cured
by verdict.

EJECTMENT for ten acres of pasture and cattle-gates in ——— close in ——— *Yorkshire*, and verdict and judgment for plaintiff; and now upon a writ of error

Dennison excepts that an ejectment does not lie for cattle-gates, without pasture for cattle.

Parker, contra, cites *Dallison*, 95, that an ejectment lies for pasture for one hundred sheep.

Lord

Lord Hardwicke, C. J. Cattle-gate in this record is an insensible word, and so we may reject it; but it must either be a synonymous word for pasture land, and for that an ejectment will lie; or it must mean common of pasture for cattle; and according to very many cases such common of pasture must, after verdict, be understood to mean common appurtenant; and for that too an ejectment will lie.

Lee, J. We must either reject the word, or take it to mean, common, and now after the verdict common appurtenant. Judgment affirmed (1).

(1) But it seems that lands will be lie. See 2 Str. 1063; *id.* 1084, wherein sufficiently described by provincial it was held, that ejectment lies for terms of the counties in which they cattle-gates.

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BROWNING *versus* DANN and Others.

TRESPASS for breaking and entering plaintiff's cellar and taking and carrying away six butts of beer, and for withholding the possession for fourteen days. Defendants justify, viz. the said *Dann* in his own right, and the said other defendants as his servants: and *Dann* pleads, that the said cellar is parcel of a messuage whereof he is seised in his demesne as of freehold for the term of his life, and that he demised said messuage to one *Thomas Keys* at will, at the rent of £12. 10s. *per ann.* by virtue whereof he entered, and being so possessed, £12. 10s. became due and in arrear for rent, and therefore he entered into the said cellar with the assent of the said *Thomas Keys*, the lessee, in order to distrain for said arrear, and did then and there take said six butts then being in said cellar in the name of a distress for said rent, and impounded said distress in said cellar, and continued the same there, until afterwards he again entered into said cellar, as his proper freehold, and then delivered said six butts to the plaintiff upon replevin thereof granted to him; and so withheld the possession for fourteen days, as being the proper cellar of the said *Dann*.

* Plaintiff replies, as to the breaking and entering the cellar and taking the six butts, that the said six butts were in the said cellar in the possession of the said plaintiff locked up there, and being so locked up in said cellar the said defendants in the night-time broke and entered into the said cellar in which, &c. so locked up as aforesaid, and then in the possession of said plaintiff, and then and there took the said butts by colour of distress and impounded them in said cellar, and continued the same till afterwards they again entered; and this he is ready to verify; and as to the withholding

Duplicity in pleading can only be taken advantage of by special demurrer.

If the outer-door of a house be open, one may break an inner-door to distrain.

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holding the possession of said cellar he replies, that said *Thomas Keys* had and continued possession thereof from *Lady-day, 1734*, to *Lady-day, 1735*; and on the last mentioned feast said *Thomas Keys* paid to said *Dann* a year's rent, which he accepted.

Defendants rejoin, as to breaking and entering the cellar and taking the beer, that on said 3d of *April, 1734*, in the day-time into the said cellar; then being parcel of said messuage through the said messuage, the door of the said messuage and also the door of the said cellar then being open, [they entered] in order to distrain, &c. and then and there in the day-time took said beer then being in said cellar, &c. and traverse the entering and taking in the night, with a *parat' verificare*; and as to the replication as to with-holding the possession, protesting that *Thomas Keys* did not pay said rent as above alledged, they demur, and shew for cause that the plaintiff hath made several replications to their own plea and justification.

Plaintiff by surrejoinder demurs generally to the first part of the rejoinder, and joins in demurrer as to the last.

And on both these demurrers the court was opinion for the defendant; for, on the plaintiff's demurrer to the rejoinder, it is against him, because he cannot take advantage of duplicity, which was the objection made to it, without having shewn it for cause of demurrer, which was not done here. And Lord *Hardwick* was of that opinion, even if it was not double; and he said, that if the outer door of a house is open, one may break an inner door to take a distress; and so one may upon an execution. And on the defendant's demurrer to the replication it is likewise against him, [plaintiff] for the replication is double in alledging the distress to be in the night, and that *Keys* continued the possession by payment of rent. Judgment for the defendant (1).

(1) As to the first point, see R. M. 416. 1 *Chitty* on Pleading, 513; see 1634. s. 17. K. B. M. 1654. s. 20, also 1 *Vent.* 272. As to the second C. P. 1 *Salk.* 219. *Willes*, 220. 1 point, this case is cited 1 *Scho. N. P. Second.* 337 b. s. (S). *Doctr. Plac.* 147. title *Distress*, n. (12). See the statute *Bac. Abr.* title *Pleas*, (K.) *Com. Dig.* 11 *Geo. II. c. 19. s. 7.* *Pleader*, (E. 2.) 1 *Bos. & Pul.* 413,

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*The KING and INHABITANTS of OULTON.

Bur. Set. Cas. [49. No. 15.] 64. [No.] 19. 2 *Set. Cas.* 296, pl. 179.

Children may gain a settlement by living with the mother, [after the father's death] as they may by living with the father [before his death.]

Whether the sessions can be compelled to state a case. *Query.*

UPON a *certiorari* to remove an order of sessions which confirmed an order made by two justices for the removal of three poor children; the order was returned, which recited the order of the two justices, and that there was an appeal, it is ordered

clared that the said order be confirmed; and then they return that counsel applied to the justices to state the fact specially in the order, which they refused, whereupon the counsel humbly delivered in their exceptions, which, says the return, are here subjoined, the effect of which were, that it was proved that the father of the children hired a farm in the parish of *Oulton* of £100 per ann. rent, and the children were born there in lawful marriage, and that his wife had a copyhold estate in her own right in the parish of *Burnham Overy*; and after the father's death the children dwelt three months with the mother there, and then the estate was sold; and therefore they think the justices ought to have adjudged the children to be settled in the parish of *Burnham Overy*. And upon this return, in last *Easter* term, *Abney* moved to quash these two orders, and cited the case of *The Parishes of Woodend and Paulspury*, 1 *Barnard*. B. R. 11. 2 *Ld. Raym.* 1473. *Fortesc. Rep.* 328. *Fol.* 279. 2 *Stra.* 746. 2 *Ses. Cas.* 124. *pl.* 116. *Michaelmas* and *Hil.* 13 *Geo. I.* [S. C. but very differently reported, 1 *Barnard*. 11.] where it was adjudged upon the authority of the case of *The Parishes St. George Southwark* and *St. Katherine* near the *Tower*, *Ses. Cas.* 73. *pl.* 69. *Fortesc. Rep.* 211. *Michaelmas* 1 *Geo. I.* that the mother's habitation upon her copyhold estate gains a settlement for herself and children. He likewise cited a case in that a bill of exceptions is to be allowed in criminal cases, which are not capital, as well as in civil.

Lord Hardwicke, C. J. But this is not a bill of exceptions.

And the court would not grant his motion, because he has made no exceptions to the order itself; for that allegation of what was the fact proved, is not part of the justices order, but only the allegation of counsel.

Afterwards he moved for a rule upon the justices to amend the return of the *certiorari*. And now

Dennison shews cause, for that the return is a complete return, they having returned their whole order.

Lord Hardwicke, C. J. We made a rule to shew cause in hopes the party might have consented to have the facts specially stated as part of the order; but since they do not consent, I do not see what the court can do. Here is an order of two justices regularly made and confirmed, to which is subjoined a certificate of counsel in form of a bill of exceptions; and if the facts therein stated are true, to be sure the justices order is bad: for it has been fully settled, that children may gain a settlement by living with the mother as well as by living with the father; but in this case, for aught we know, the court might refuse to state these facts specially because they were not fully proved. I allow there are cases, where the court has ordered the return to a *certiorari* for removal of orders to be amended; as, where there has been a mistake in stating the adjournment of the cause, or of the sessions: but what is now asked would be to alter the fact itself, which I do not know that we can do without consent.

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Page, J. The consequence of this would be to bring all the facts into this court to be determined.

Probyn, J. I remember a case something like this, where the order was returned and annexed to it the examination on which the order was grounded; but the court would take no notice of it, it being no part of the order, nor referred to by it.

Lee, J. If there be any method to make the justices state the matter specially, and I have heard it said by this court that they are compellable to do so, it must be, to be sure, by bill of exceptions (1).

Rule discharged.

(1) But as to bill of exceptions to 77, *Fol.* 278. 2 *Str.* 683. 2 *Const.* 28, order of sessions, see *Burr. Sett. Ca.* S. C. id. 739.

BASKET and RAYNER.

A prisoner in the *K. B.* at the suit of the King, upon a conviction for a libel, may be charged with civil process, and leave will be granted of course, either by motion in court or a judge at his chambers.

PLAINTIFF, who is the King's printer, and has the sole right of printing bibles, has obtained an injunction in Chancery to restrain the defendant from printing any; upon which injunction the defendant is in contempt: and, being, likewise, a prisoner in the King's Bench prison, at the King's suit, upon a conviction for printing and publishing a libel;

Pratt, in behalf of the plaintiff, moves for liberty, to charge him with an attachment, and having given notice to the attorney-general, he came into court and consented.

Lord Hardwicke, C. J. To charge a person who is in custody here upon a criminal prosecution, with civil process, is a motion of course, and a judge may grant it at his chambers. Be it so (2).

(2) But it cannot be done without *Lev.* 124. 1 *Sid.* 154, S. C. 1 *Lev.* leave, *T. Raym.* 58. 1 *Sid.* 9. S. C. 1 146. 1 *Salk.* 354. *R. T.* 2 *Geo.* (c).

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*JORDAN and TWELLS.

Where plaintiff has lost a trial, defendant will not be permitted to amend his plea.

In pleading eviction by a person other than the plaintiff, the defendant must shew that the evictor had title to enter; whose title ought to have been set out; and the defendant should also shew under what process the evictor entered.

ACTION of debt on a covenant contained in an indenture of lease; defendant pleads, that after making the lease and before any rent due and payable one *K. P.* after making the said indenture, having a prior and better right and title to the premises than had been granted to the defendant, against his will entered into

into the premises, and by due process and course of law expelled and evicted the defendant. To this plea plaintiff demurred, and shewed for cause that the defendant in his plea had not set forth what right or title the said K. P. had to the premises, nor by, or from whom such title accrued to her, nor had traversed, or confessed the title set up by the plaintiff, nor had set forth by what process, nor out of what court issuing, the said K. P. did evict him. And upon this demurrer the defendant joined, so long ago as *Easter* term last, and the cause is now made a *concilium*, and stands for argument this day. But three or four days ago, since the cause was set down in the paper, *Taylor*, for defendant, moved to amend the plea. And now

Draper shews cause, viz. that the application is now too late, the plaintiff having been delayed of his trial last assizes, and the cause being now in the paper; and cites the case of *The King* and *Edwards*, *Michaelmas*, 8th of the present King; where, after the defendant had demurred, and an assizes past, and he afterwards applied to withdraw his demurrer and plead, the court refused, because the trial had been delayed.

Lord *Hardwicke*, C. J. The great objection to this motion is, that the plaintiff has lost his trial, and if this be allowed, it will be a certain method of delay. Formerly, in all amendments, the party was to shew that the proceedings were all in paper; though, of late, that has been got over.

Lee, J. I think the case of *The King* and *Edwards* was just this case, and the court refused it because it tends to delay.

Page, J. There have amendments sometimes been allowed, even when the cause was come down to trial: and I remember in the case of *Dyte* and *The Bishop of Worcester* in ejectment, after trial had, the plaintiff found he had left out the name of one of the defendants in the *Nisi prius* roll, and was allowed to amend it: but I believe all amendments that have been allowed of when the cause is got so forward have been at the instance of the plaintiff.

Cur' would not let him amend (1).

And

(1) As will be evident from this case, and from the authorities cited below, all amendments are altogether discretionary in the court. See 1 *East*. R. 135. In the present case, one ground of refusing the amendment was, that it was not sought at the instance of the plaintiff, but see 2 *Salk*. 52. *Gillb*. C. P. 114, where it seems that after a demurrer or joinder in demurrer, either party, is at liberty to amend as a matter of course, whilst the proceedings are in paper. And amendments are permitted even after demurrer argued. 2 *Wms. Saund*. 402. 2 *Str*. 735. 954. 976. 1 *Bar*. 321, 322. 1 *Doug*. 330. 2 *Doug*. 320. 1 *East*. R. 372. *Bar*. 9. 20, 21, 25,

but not after the opinion of the court on argument, 1 *East*. R. 391; see *Bar*. 9. 1 *H. Bl*. 37. 2 *Bos. & Pul*. 482. 3 *Bos. & Pul*. 11, 12. The general doctrine in this respect is, that if one party obtain leave to amend, or to withdraw his demurrer, the other party shall not be delayed or prejudiced thereby, 2 *Burr*. 756; and in furtherance of the general doctrine, that amendments will always be permitted, for when the justice of the case requires it, and there is any thing to amend by, the courts have gone the length of permitting a plaintiff to amend his replication to a sham plea after argument, without even paying costs, 1 *East*. R. 372. This case

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And immediately the cause, which had been reserved till after this motion, was called on for argument.

Draper, pro quer' took another exception to the plea, besides the causes shewn in the demurrer, viz. that it is not shewn that the said K. P. had a title to enter. He took also another exception to plea, viz. that the defendant had not traversed his possession and enjoyment of the premises; to support which he cited 2 *Ventris*, 67, *Bainton* and *Bobbet*. And he said that this is a plea of *nil habuit in tenementis*: and cited the case of *Evans and Lady Fauconberg, Michaelmas*, 13 Geo. I. (1), where it was solemnly determined, that *nil habuit in tenementis* cannot be pleaded against an indenture of lease. He said further, that the defendant ought to have shewn that the eviction was by judgment and writ of possession, and that it has been held, that shewing a writ of possession awarded is not a sufficient shewing of the eviction, without shewing the judgment also.

Taylor, pro defendente. As to the exception for not setting out the evictor's title, he cites 2 *Leo*. 37, *Proctor and Newton*: 3 *Lev*. 325, *Buckley and Williams*; and *Norman and Foster*, 1 *Mod*. 101; where in action of debt on bond for not performing a covenant in a lease for quiet enjoyment, plaintiff assigned for breach that stranger entered, but doth not say that he had title. And *Hale* said *habens titulum* at that time, would have done your business. He cited also *Vidian's Entries*, 165, where there is a plea of eviction just in this manner.

Draper in reply, cited *Winch's Entries*, 176, where there is a precedent of such a plea, with all those matters set out, which ought, he says, to have been set out here.

Lord Hardwicke, C. J. As to the exception for want of setting out the evictor's title, I think the plea is ill; and no cases have been cited to shew it good: for the cases relied on for the defendant, are breaches of covenant for quiet enjoyment, and in those it is sufficient, if you assign the breach in the words of the covenant, so you shew that the title of the evictor was not derived from the plaintiff himself. But in this case, here is no assignment of breach following the words of a particular covenant; for aught appears, this eviction might be by collusion. Upon this plea there must have been a complicated issue of law and fact before the jury; for the issue must have been that K. P. had not a better right and title than had been granted to the defendant.

The defendant ought to have shewn likewise that K. P. had a title to enter, for possibly she had no title of entry, though she had a title to recover in a real action; and in the entry cited from *Winch* the plea shews a good title and a title of entry; and as to not

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case seems, however, to have been cited as an instance, where the court has not adverted to the rule laid down, 2 *Bur*. 756, see 2 *Tid*. 719, n. edit. 1012, and certainly by that decision,

the defendant, although availing himself of the rules and practice of the court, was prejudiced.

(1) 1 *Chm. R.* 391.

not setting out what process, it is bad in that also, for if the defendant had shewn a judgment and writ of possession, plaintiff might have taken issue of *nul tiel record*; but this plea is not a plea of *nil habuit in tenementis*.

Cur'. Judgment for plaintiff (1).

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(1) The authority of this case, so far as relates to the pleading eviction, has been solemnly denied; first, by 4 T. R. 617, where it was relied upon *arguendo* as a principal case for the very points here raised and resolved; but the ancient authorities then cited, together with the unreasonableness of exacting at a party's hands the pleading facts about which he could know nothing, determined the court to adhere to the old decisions. Secondly, by 8 T. R. 278, where the case, 4 T. R. 617, was adverted to; and Lord *Kenyon*, C. J. in delivering the opinion of the court, in 4 T. R. 617, said, that all the former cases were considered, and that the breaches in the declaration in that case were well assigned, and therefore, on the authority of 4 T. R. 617, and on the expediency of the thing, the plaintiff in 8 T. R. 278, had judgment.

The KING and The INHABITANTS of STOW BARDON.

— moves to quash an order of removal returned upon a *certiorari*, his exception is, that the order returned is on paper. Return to a *certiorari* made on paper, quashed.

Cur', You should move to quash the return, for this order in paper is no order; so that no order is returned. Let the return be quashed (2).

(2) I am unaware of any other authority for this point, except usage.

LEE and IRISH.

HOLLINGS moves to bring so much into court, and that it may be struck out of the declaration, it is in an action of debt for rent. In debt for rent the money cannot be brought into court.

Cur', We cannot do it in an action of debt for rent (3).

Then he moved that it be referred to the Master to compute what is due.

Cur', Be it so, upon the defendant's undertaking to pay what shall be reported due.

(3) 2 *Str.* 820, acc. Before these 526, 597; and at present the bringing decisions the practice in respect of money into court in debt for rent is of debt for rent was otherwise. 2 *Salk.* course. See 1 *Tid.* 537, 621, edit. 1812.

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MARSHAM and GIBBS.

2 Stra. 1022. Bath. Tri. at Ni. Pri. 140.

Not guilty in *assumpsit* bad on demurrer, although cured by verdict.

ASSUMPSIT for several promises; defendant pleads Not guilty, to which plaintiff demurs, and shews for cause that is not allowable to plead so.

Draper, for defendant cites *Elrington* and *Doshant*, 1 Lev. 142, not guilty, pleaded to an action on *assumpsit*, and held good after a verdict: and *per Wyndham*, not guilty, is a good plea and issue in *assumpsit*, for it is trespass on the case.

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*Lord *Hardwicke*, C. J. There are twenty cases where it has been held bad on demurrer, though it is cured by a verdict. The point of this action is the debt. Judgment for plaintiff†.

† *Noy's Rep.* 56. *Broun.* 8. *Al.* 77. 371. *Ld. Raym.* 90. *Sid.* 236. *pl.* 3. *Com. Rep.* 10. *Comb.* 379, 380. *Carth.* 2 *Barnes*, 252, 253 (1).

(1) *Palm.* 393. *Bend.* 154. But see also *Cro. Eliz.* 470*, *pl.* 29, where it was held a good plea, because there was a deceit alledged to charge the defendant. See 1 *Wms. Saund.* 103. See also *Gibb. C. P.* 54, where it is said, that in actions upon contracts, &c. the issue is *non assumpsit*, instead of the old issue, not guilty.

The KING versus MARROW.

One joint tenant may indict the other for a forcible entry.

The court has a discretionary power to award restitution immediately upon a removal of an indictment for a forcible entry by *certiorari* before plea, and therefore will put the defendant under terms to plead or demur in two days; and if he plead, to take short notice of trial.

THE prosecutor and the defendant are joint tenants for a term of years not yet expired; and the defendants are indicted at the sessions at *Hicks's Hall* for a forcible entry, which indictment, immediately upon its being found, was removed by the prosecutor into this court by a *certiorari*; and

Serjeant *Hawkins* for the prosecutor moves for an award of restitution; and cites, to shew that an indictment will lie for one joint tenant against another, 8 *Edw. IV.* 19, *pl.* 31. 10 *Hen. VII.* 27, *pl.* 6. *Palmer*, 419. *Latch*, 224. *Fitz. Nat. Brev. Ch. Forcible Entry*. And that restitution may be awarded in this case, he cites *Dyer*, 122, *b.* 123, *a.* 1 *Keble*, [343, 538, 600, 614, S. C. but not S. P.] *The King* and *Burgess*, S. C. *T. Raymond*, 85. *Hale*, P. C. 141, [*quare*, 213?] *Cro. Eliz.* 916. *Fitz-William's* case, and S. C. *Yelverton*, 32. For defendant was cited at the shewing cause, 14 *Edw. IV.* *fol.* 8. *pl.* 16, that it does not lie for one joint tenant against another.

See other cases relating to this matter, *Latch*, 182. 4 *Inst.* 176. *Salk.* tit. *Entry Forcible* (2).

The

(2) 1 *Salk.* 260.

The court were clearly of opinion that this indictment lies for one joint tenant against another (1), and that this court has power to award restitution upon a removal of the indictment by *certiorari* (2); but doubted as to what time should be allowed the defendants to traverse the indictment or to plead; for in either of those cases their counsel alledged that restitution must not be awarded till the traverse or plea be determined; so it went off in order to have precedents searched as to that matter; and now at a subsequent day in this term the court delivered their opinion.

Lord *Hardwicke*, C. J. There must be a writ of restitution unless the defendant pleads in a reasonable time; there are very few precedents to be found. But by *Dalton's Justice*, ch. 131, p. 314, it appears that the justices of the King's Bench, upon an indictment removed by *certiorari*, may award restitution; and by ch. 134, p. 319, of the same book, it is said to be the law and course of the court, "that restitution is a thing in the discretion of the court, and they *will grant it or deny it as the justice and reason of the case shall require, and that it being a thing discretionary, the equity and reason of the case doth often incline the court not to grant it where they may do it, especially if the party in possession shall offer to appear, and go to speedy trial of the right; and so, says the book, I have often observed it to be done (3)." And in *Crompton's Justice*, p. 165, it is said, if the party puts in a traverse immediately, but does not pursue it with effect, and afterwards upon restitution being prayed a second time he tenders another traverse, the court may award restitution notwithstanding, where, observe the words of the book are, *if he shall tender a traverse immediately*. As to the case in *Dyer*, 122, b. it is full to this purpose, viz. That a tender of a traverse is either a *supersedeas* to award the restitution, or is not so at the discretion of the court, according as the truth of the title appears to them; so that upon the authority of that case I should think that though the defendant should now offer a traverse, we are warranted to award restitution, because it is a case of joint tenants, and that it appears the prosecutor's trade is stopped, &c. which are favourable circumstances; but however in the margent of that place in *Dyer* it is said to be a good plea to stay restitution to alledge possession for three years, and that the clerk of the peace upon such a traverse tendered may grant a *supersedeas* to stay restitution; which falls in with what is said in the *King and Burgess*, 1 *Keble*, 343, that when a plea is offered; be it at any time, the court is foreclosed and cannot award restitution, and that the proper time to offer a plea is when restitution is prayed, which, as I said, falls in with the margent of *Dyer*, and with the intention of the statute as *festinum remedium* (4). We have found a precedent of *Michaelmas*, 31 Car. II. which is a copy of a writ of restitution, whereby it appears, that the

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(1) See also 2 *Hawk.* P. C. 38.(2) *Id.* 46. 1 *Str.* 474.(3) See also 2 *Hawk.* P. C. 50.(4) See also 1 *Salk.* 260. 1 *Ld. Raym.* 449. *Com. R.* 61. *S. C.*

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the indictment was found at the *July* sessions, and removed hither, but not said when; but it appears an imparlance was granted till the first day of *Trinity* term afterwards, and then at the *quarto die placitandi solemniter exact non ven'*, and judgment by *nil dicit*, and restitution awarded to put the party into such possession as he had before; and at first sight this precedent seems to be in favour of defendant because of the four days given to plead; but if considered, there can be nothing concluded from it; but upon comparing it with the books the truest inference that can be made is, that if upon an indictment being removed, the prosecutor does not apply for restitution, then it will go on in the common course, by imparlance, rule to plead, &c. but if he moves for restitution, as he may do, that will accelerate the proceedings, and put the defendant to plead quickly.

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Lee, J. The business of the court is to re-seise the party, so the words of the act are, and no damage can happen to the defendant *from thence, for the court, if he shall appear to have right, may afterwards award a writ of restitution to the defendant. *Cro. Jac.* 148. *Yelv.* 99, in which case restitution was granted before the defendant pleaded at all, and he afterwards pleaded in order to have re-restitution notwithstanding the award of restitution. The right still lies open for inquiry, and the force too.

Lord Hardwicke, C. J. We do not intend to preclude the defendant from demurring, because *Dalton* makes a difference, (though upon what grounds at present I do not see) between an action and an indictment.

The rule was, that unless defendant pleads or demurs within two days, and if he pleads, to take notice of trial within term, then let restitution be awarded.

The KING versus MOORE.

Andr. R. 18. [S. P.]

The oath of the informer is insufficient to ground an information on a penal statute requiring "proof to be made on oath."

DEFENDANT is a justice of peace, and one *Peach* having seised a seventh horse in a waggon pursuant to the stat. of 5 Geo. I. c. 12, applied to the said justice after having delivered the horse to a constable as the act directs, and the justice refused to hear him, and so he could not have his warrant to have the horse again, and therefore moved for an information; and now upon the justice's shewing cause it appears he did not refuse, but the informer would not stay till he had done some parish business which he was about, and he produced no one to make oath of the fact but himself.

Lord Hardwicke, C. J. Suppose even there had been proper proof,

proof, it was not to be expected that the justice should leave what he was about; but however the proof was insufficient, nor he offered only his own oath, and therefore it had been right in the justice to refuse it, as he was to have the benefit himself; and the words of the act are, "shall make proof by oath," which must be understood to be proper proof; and it was solemnly determined in *The King* and *Collins* (1) in this court, that an informer's oath should not be taken as evidence. Rule discharged with costs (2).

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(1) Not elsewhere reported; but on Convictions, 69. Although in this, cited *Andr.* 18.

(2) 1 *Str.* 316, S. P. *Andr.* 240, S. P. but not on the same statute. 2 *Ld. Raym.* 1545, S. P. *Contra* 3 *Mod.* 114; but *qu.* the authority of this case. See *Andr.* 240, above cited, and *Boscow.*

*WOODIN and COLLEDGE.

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UPON a rule to shew cause why a bond and warrant of attorney to confess judgment should not be aside, it having been made during the defendant's confinement under an arrest, and no attorney but the plaintiff's attorney being present; and why the judgment and execution thereupon should not be set aside.

Marsh shews cause that the warrant of attorney was made to confess judgment in the Common Pleas, and that, accordingly, the judgment is a judgment of that court; and should infer, that this court has nothing to do in the matter.

Drazer for the defendant answers, That it was made to confess judgment in the Common Pleas, yet it was upon an arrest by *latitat* out of this court.

Lord *Hardwicke*, C. J. Then we have had to do with it, or else this would be a trick to avoid both courts.

Marsh: The plaintiff's attorney was present, and the defendant was satisfied therewith.

Lord *Hardwicke*, C. J. The judgment is irregular for want of the presence of an attorney named by the defendant, which is contrary to an express rule of the court (3); and not because such warrant

If a warrant of attorney to confess judgment in C. P. be given by a defendant in custody on process issuing out of K. B. without an attorney being present on his part, the court of K. B. will interfere by way of attachment against the plaintiff and his attorney, the same to lie in the sheriff's office until either satisfaction of the judgment in C. P. be entered upon the roll, or a consent given in that court that the judgment and execution be set aside, with costs.

(3) R R. E. 15 Car. II. E. 4 Geo. II. K. B. No rule similar in terms to that of 4 Geo. II. K. B. seems to have been made in C. P. The rule in 24 and 25 Car. II. C. P. referable to the presence of an attorney, being applicable to where the defendant is in custody of a bailiff or sheriff's officer; whereas the rule in K. B. is more extensive, viz. "where he is in the custody of any sheriff or other officer." The other rules in relation to warrants of attorney are 42 Geo. III. K. B. 14 and 15 Geo. II. C. P.; but this last rule seems dispensed with. 2 *H. Bl.* 383. See *Peacock's Rules and Orders*, K. B. C. P. But the cases where an attorney's presence, in every case of custody

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warrant of attorney may not be fairly obtained in such a case, but the rule was made in order absolutely to prevent any abuse; and against this rule I do not know any excuse can be allowed; so that the judgment is irregular, and though we here cannot set aside a judgment of the court of Common Pleas, yet as the *latitat* was sued out here we can lay our hands on the plaintiff and his attorney.

Cur'. Let an attachment go against the plaintiff and his attorney, and lie in the sheriff's hands a week, to be executed if he do not consent either to enter up satisfaction on the record in the Common Pleas, or consent there that the judgment and execution be set aside and to pay the costs (1).

on *mesne* process is necessary, are common to both courts. See 1 *Bos. & Pul.* 97. 2 *Taunt.* 49. *Cooke's R.* 158; although in this last case the custody does not appear. And the rule must not be made an instrument of fraud. 1 *Corp.* 141.

1 *Bos. & Pul.* 97. See also 7 *T. R.* 8. *East. R.* 24.

(1) It may be questionable whether, in a case similar to the present, the court of K. B. would not now leave the party to his proper remedy in C. P.

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*ANONYMOUS.

An executor allowed to plead double, viz. payment and *plene administravit*.

AN executor had leave to plead double to an action of debt upon bond, viz. payment of the principal and interest before the action brought, pursuant to the statute of Queen Anne for amendment of the law (2); and *plene administravit* (3).

(2) 4 *Anne*, c. 16.

(3) See p. 127, *ante*, n. (1).

The KING and The CORPORATION of OXFORD.

Application, grounded on stat. 11 *Geo. I. c. 4*, for a *mandamus* to proceed to an election of a mayor.

Two writs of *mandamus* granted for the same election.

APPLICATION for a *mandamus* to the members of this corporation to proceed to the election of a mayor pursuant to stat. of 11 *Geo. I. c. 4*.

The objection against it is, that the statute only extends to the defect of election within the year; whereas here has been no mayor since the year 1730; that is to say, no legal mayor; for others have been actually chosen, but illegally, and have all since that year been successively ousted upon *quo warranto*.

Lord Hardwicke, C. J. This is a remedial law, and, therefore the

ert should make it as effectual as the words, or any construction of them, can warrant; and the court has always made a liberal construction of it in these cases; so in the case of *The Borough of Osseneay, alias Tintagel*, 2 *Str.* 1003; a *mandamus* was given to elect a mayor, though there was actually a person who had been elected, at the time, to be mayor, and no information, *quod non*, nor judgment, had been had against him. As to the question, that this is not within a year, whatever might be the intention of the act as to that, there are, however, no words to tie it to a year; and as there are not, I think a *mandamus* ought to be granted in his case; and rely on the provision intended by the act, which prevents the dissolution of corporations, and to give room for the election of head officers; though these several elections have been adjudged void: but there are no words to dissolve the corporation, but on the contrary the act says, if the election is held the corporation shall have power to elect and shall not be dissolved; so that here is a corporation in being and capable of acting, and an express clause in the act to enable the court to grant a *mandamus*, and no negative words to restrain it. The case of *The Corporation of Macclesfield* is in point. The occasion of making that writ 11 *Geo. I.* [c. 4.] was the case of *The Corporation of Banbury* (1).

age, J. In the case of *The Borough of the Devises*, which was before the case of *Banbury*, the corporation for a defect of charter was extinct; and my Lord Chancellor *Somers* directed a writ of *mandamus* to the corporation to proceed to an election, and it was held by *Holt* and the whole court, that the corporation could not be revived unless that writ could be considered as a new charter. So all the court agreed in granting a *mandamus* in this case.

Afterwards the same day the counsel that had opposed this *mandamus* moved for the like *mandamus*, that they too might have the writ granted down a *mandamus*, and said two writs were so granted in the case of *The Borough of Evesham* (2). Then *per curiam*. Be it

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I have not been able to meet any report either of this case nor of the Borough of *Macclesfield*, but the *Banbury* case is slightly mentioned, 3 *Burr.* 1372.
(2) Probably *S. C.* 3 *Str.* 949, but not *S. P.*

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BAILY and EDWARDS.

Nil debet pleaded in an action upon a promissory note, although ill upon demurrer, is an issuable plea, within the meaning of a judge's order for time to plead, and upon which the plaintiff cannot have leave to sign judgment.

IN an action on the case upon a promissory note, defendant had time to plead, but was to plead an issuable plea, and at the time he pleaded *nil debet*; and now

Serjeant Girdler, for plaintiff, moves to set aside the plea, and to enter up his judgment.

Lord Hardwicke, C. J. If indeed the defendant had demurred and so delayed you, your application might be proper; but here you may take issue, for though it is a bad plea if demurred to specially; yet it will be well after a verdict; or you might demur and have judgment that way; but a bad plea is not a breach of the order, though a demurrer or frivolous plea would be so. Take nothing(1).

(1) This plea, if now pleaded in *assumpsit*, might be treated, and judgment signed upon it as a nullity, 1 *Tid.* 561. edit. 1812. But see *Laves* on Pleading, 329: yet this case is not

cited, as it might have been, as an authority for the doubt expressed by Mr. *Laves* as to the propriety of signing judgment, where *nil debet* is pleaded to an action in *assumpsit*.

EVANS and JONES.

Where the defendant swears that he neither knows, nor is indebted to plaintiff, and that his attorney cannot be found, proceedings will be stayed; and sticking up the rule in the office will be deemed good service.

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DEFENDANT is served with a declaration to which there is the name *S. Greene* put as attorney for the plaintiff, and upon an affidavit of defendant that she does not know the plaintiff, nor is at all indebted to him, and that she has made strict enquiry and cannot find this *Greene*, nor any one who is concerned for the plaintiff, and that *Greene* is not on the roll of attorneys of this court.

Agar moves that the proceedings may stay till plaintiff's attorney gives defendant notice where the plaintiff lives; and that sticking up this rule in the King's Bench office may be deemed good service thereof.

Cur'. On consideration of the circumstances of this case, and that the practice to allow such rules in writs of error from *Ireland*. Be it so (2).

(2) Since this case, the fixing up the notice, rule, &c. in the master's office, is, under the circumstances stated,

rendered good service by rule of court, viz. R. H. T. 8 Geo. III. K. B.

THOMPSON

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THOMPSON and DEMPSTER.

ON the motion of Mr. *Phillips*, a rule was made upon the sheriff of _____ to bring into court the money levied by him on a *fieri facias* (1).

Rule for the sheriff to bring in money levied by him on *f. fa.*, granted.

(1) After a return of *fieri facit*, the sheriff may be proceeded against in this way, or by action of debt founded on his return; so, although no re-

turn made, debt account, or *assumpsit* lies for the money levied, *Cro. Car.* 539. 2 *Show.* 79. 281. *Gilh. Execut.* 25.

COLLIER and MORRIS and Others.

ONE *Ridings* was subpoenaed as a witness on behalf of the plaintiff in a cause which was tried at the sittings after last term in *Middlesex*, and was three times called, but did not appear, wherefore an application was made to the court from the plaintiff for an attachment against him; and now

Where the witness attended on his subpoena, but came too late, an attachment was refused on motion, and the party referred to his remedy by action.

Kettleby shews cause; and produces an affidavit of *Ridings* that he did attend at the trial, and was ready to give evidence, but came too late, after he was called, and that he could give no other evidence than was given by one of the witnesses who was sworn; and that notwithstanding his absence, plaintiff had a verdict and £90 damages.

As to that it was answered for the plaintiff, that two of the defendants were acquitted, whereby the plaintiff has been obliged to pay them £20 costs.

Lord *Hardwicke*, C. J. I do not see any reason, in this case, to proceed by this extraordinary way of attachment, for the ancient and ordinary remedy is by action on the statute (2), which, if you think yourselves wronged, you may pursue. *Tot' Cur'*. Rule discharged (3).

(2) 5 *Eliz. c. 9. s. 12.*

(3) So when the witness from no ill motive, or from negligence, absents himself, it is no contempt for which an attachment will be granted, 5 *Taunt.* 260. 1 *Marshall R. S. S. C.* It appears that the court of C. P. leans against the remedy by attachment against a witness. See *Pr. Reg.* 435. *Bar.* 497. 33. 35. 1 *H. Bl.* 49. 13 *East.*

16 (a). But it should seem from the last note, that it is a rule in the court of C. P. never to grant an attachment against a witness; see also 2 *Tidd.* Index, where, it is said, it lies not. But see 35, 36, where it is said the court declared, that in some cases they would grant attachments against witnesses, though hitherto the same had not been done.

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NOTT and LONG.

2 Stra. 1025, S. C.

An award to pay costs, to be settled by any other than the proper officer, is bad.

ACTION of debt upon an arbitration bond. Defendant pleads *nil* award; plaintiff replies and sets forth an award, which, amongst other things, awards that the defendant shall pay the plaintiff such sums as *James Willis* and *John Godfrey* shall settle for costs, having regard to such costs as are usually taxed by Masters in Chancery; and then, mutual releases awarded: and that the said *J. W.* and *J. G.* settled the sum of — to be due for costs, in which they had regard, &c. and so assigns a breach in non-payment of these costs; to which replication defendant has demurred. And it was argued last term by *Draper* for defendant, and *Hussey* for the plaintiff; and again this term by *Parker* for defendant, and *Lacy* for the plaintiff.

For the defendant it was argued, that the award was bad, because the arbitrators had delegated their authority; and his counsel cited the case of *Winter* and *Garlick*, which is in 1 *Salk.* 75, and 6 *Mod.* 195; where an award was to pay the costs of a suit then depending in an inferior court; and *per cur'*, to pay such costs as the master shall tax, is good, for *id certum est quod certum reddi potest*; but they held that award to be bad, as being too uncertain.

For the plaintiff were cited, *Cro. Car.* 383, *Beal* and *Beal*: award to pay the charges in such a suit, held good; 1 *Roll. Abr.* 251, *pl.* 14, to pay his part of the charge of the voyage, held good. 2 *Ventris*, 242; to pay the costs expended *circa prosecutionem prædict'*, held good. And *Lacy* argued that this taxation to be made by *J. W.* and *J. G.* is but a ministerial act, and they may delegate their authority in ministerial acts, though they cannot in judicial acts; for which distinction he cited *Style*, 217, *Cater* and *Startue*; and *Palmer*, 146, *Grove & al' v. Cra & al'* [*Cro. Jac.* 584, S. C.]

The judges spoke to this, last term, viz.

Lord *Hardwicke*, C. J. One would go as far as possible to support awards, where there is no objection to their being fairly made, but I doubt if this award be good. It is true in the case of *Winter* and *Garlick* it was held, that the arbitrators might award the party to pay the costs to be taxed by the master; and even that is going beyond the general rule; but the reason of it seems to be, that arbitrators are judges between the parties, and, as it were, put in the place of the court by the parties, and as the court may give judgment for costs, so they have been allowed to do also; but they must *order them to be taxed by the Master as the court would do: now this not is so ordered, but, for aught appears, the taxation is referred to persons who are ignorant of the matter. And the

cases

cited by *Hussey* are not contrary to this, for they are, where were awarded generally; which I think is well enough, for they will be referred to the proper officer.

Keble, J. agreed with the Chief Justice.

Robyn, J. inclined to think the award good, and that they may appoint these two persons, as they might the Master, for no more than taking them to their assistance.

Keble, J. I think this is a direct delegation of their authority; he cited the case of *Robinson and Barnesley* last *Hilary* term, where an award that the party should give security fourteen days after their time was expired, was held to be bad. These persons may be considered as their delegates; and in case of a private award, it is a settled rule, that they must execute it themselves, and cannot delegate it. Indeed, it may be different when referred to the Master, because that is the settled way of taxing costs, by the law of the land.

And now this term all the court agreed that the award is bad.

Lord Hardwicke, C. J. As to awards, there are three rules; 1st, That the arbitrators must make a final end, so as the parties have the fruits of it without suit. 2dly, That they cannot delegate their authority. 3dly, The award must be made within a time limited. Now this award does not make a final end, for it is a matter to be done after the time expired. But it is said, as to costs to be taxed, that is allowable; and it is true it has been allowed to be referred to the proper officer, as in *Winter and Hick*; but it is there expressly said, they must be settled by the arbitrators, or by the master; and that is reasonable enough, because the reference to the proper officer makes an end of it, for it is subject to the authority of the court, who, if he errs, cannot annul his errors summarily, but if referred to strangers, the court may intermeddle. 2dly, The arbitrators must execute their award themselves: which they have not here done. Indeed, a distinction has been taken between judicial and ministerial acts; this is not a mere ministerial act, and appears not to be so, from the nature of this award, for they are directed to have regard to the costs as a Master would allow, which is certainly an act of judgment; but when the reference is to the Master it is in the eye of the court. Suppose these two persons had been mistaken as to the costs should be allowed, how could it then be settled but by a trial before a jury upon averment, that it was so or was not so? And this is no inconvenience, for they might within the time limited have had the assistance of these two men in this matter, and have made it part of their award.

Keble, J. By *Cro. Jac.* 315, 584. The arbitrators cannot release the authority to themselves after the time of the submission. *Kings, cont. fo.* 128. If the award be to release to another by the advice of *J. S.* it is good; and the reason given is, because the reference is only for the execution of the arbitrement; for he has put it down as a rule, that the arbitrators cannot delegate their authority.

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authority. It is true, that in cases of costs, it has been allowed, to refer to the Master; and the reason is, because they have then made an award of costs in the same manner as costs are usually given. *Comberbach*, 456; award that if the plaintiff makes out before a judge any disbursements laid out for the defendant, that the defendant shall pay them likewise, held bad; but *Holt* there said, they have no liberty to do any future act unless it be by referring the matters in difference to a master of a court to tax costs; which is agreeable to what he says in *Winter* and *Garlick* (1). Reference to a master is proper execution of the arbitration and is merely ministerial, but reference to a stranger is judicial, Judgment for defendant (2).

(1) 1 *Salk.* 75.(2) Cited 2 *Tid.* 826. See 1 *Salk.* 75, n. (a). *Kyd. R.* 135, 136. 2 *Str. n.* (1), (2).SIBBET *versus* RUSSELL.

Where it appears that the signing interlocutory judgment was after the defendant's death, the same, and the *scire facias* thereon will be set aside.

UPON a motion to set aside a judgment, and a *scire facias* to revive the same; it was referred to the master, who reported, that the declaration was delivered the 9th of June last; the rules to plead were out on the 13th of June, a summons taken out before Lord *Hardwicke*, at his chambers, the 18th of June, for time to plead, because the defendant was ill at the Bath. Attendance before — on the 19th, when he gave the defendant time to plead to the 25th, but in fact the defendant was at that time dead at the Bath, though the attorneys knew nothing of it, for he died the 18th, and therefore his attorney did not plead within the time given; and on the 26th the plaintiff signed his judgment, and has since sued out a *scire facias* against the defendant's executors.

Abney, for defendant; that by his death the suit was abated, for though by the stat. of 8 & 9 *Will. III. c. 11. s. 6*, if the defendant dies after the interlocutory judgment signed, and before final judgment, the suit shall not abate, yet here in this case the defendant died before any judgment signed at all.

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**Marsh*, for plaintiff; that the judgment is good because when once signed it has relation to the first day of term, except as to purchasers, and if so, it is a judgment against him before his death; and he cited a case of *Fuller* and *Jocelyn* about three or four years ago, 2 *Stra.* 882 (3). *Barnard. B. R.* 357, 358, 404. See *Andr.* 54, [309], where a warrant of attorney to enter up judgment was dated the 9th of April; term began the 21st of April; Lady *Twisden*, who made the warrant of attorney, died the 22d of April, and judgment signed the 23d: yet the judgment was affirmed,

(3) *Ante*, 158, S. C. under the names of *Fuller* and *Johnson*.

affirmed, though signed after her death, because it had relation to the first day of term when she was living.

Lord *Hardwicke*, C. J. So it was, for in all cases of warrants of attorney, as they are not adversary causes, *et ut res magis valeat quam pereat*, they have supported these judgments by such relation; but this is an adversary cause, and suppose there had been no further time given to plead, but after the rules for pleading were out defendant had died, and judgment had been signed after his death, sure that would not be a good judgment; for, the defendant, after the rules for pleading are out, may plead at any time before judgment is signed; and the order for further time to plead, was never intended to bind the party as if judgment had been signed on the day on which the rules for pleading were out. The statute [8 & 9 *Will.* III. c. 11. s. 6.] will not vary the case at all.

Per Cur. The judgment and *scire facias* must be set aside (1).

(1) In this case, as the above statute interlocutory judgment, the action only refers to the plaintiff's death after abated. See 6 *Mod.* 144, *acc.*

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The KING versus The OVERSEERS of the POOR of the Town of SPOTLAND.

A *MANDAMUS* issued to the defendants to make a rate for the poor. The defendants returned that there are two townships, *Further Spotland*, and *Nearer Spotland*; and that overseers are appointed for the township of *Further Spotland*; and that the inhabitants thereof have made a rate and provided for their poor; and upon this return, in behalf of the township of *Nearer Spotland*; an information was moved for against the defendants, as for a false return; for the question is between these places; whether they shall join in the maintenance of the poor, as one parish or township, or not; there being many in *Nearer Spotland*, and very few in the other; and therefore *Nearer Spotland* alledged that they are not distinct, but one and the same township: which, now, upon shewing cause, is denied by *Further Spotland*; and they offer to try it in a feigned issue.

*Lord *Hardwicke*, C. J. If this had been a *mandamus* upon the stat.† of *Q. Anne*, the return might have been traversed; or had it

Where no one in particular is interested to bring an action for a false return to a *mandamus*, and the affidavits are contradictory, the court will direct an information to try the facts between the parties.

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† That stat. is 9 *Ann.* c. 20, which is an act for rendering the proceedings on *quo warrantos* and *mandamus* more effectual in cases of members of corporations who have been turned out of their franchises, and enacts, that when a return is made to such *mandamus* it shall be lawful for the person suing or pro-

secuting such *mandamus* to plead to or traverse the material facts contained therein, to which the persons making such return shall reply, take issue, or demur, and such further proceedings shall be had therein as if the person had brought an action for a false return, &c.

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it been a *mandamus* concerning some private right, the party might have had an action for a false return; and so a peremptory *mandamus* if the return had been wrong: but here there cannot be an action for a false return, because no one is particularly interested; so there is no remedy but an information; and there being a direct contrariety in the affidavits, it is the course of the court to grant an information to try the fact (1).

Per Cur'. Let the information go.

(1) See 4 Burr. 2452, 3, where on an of proceeding is suggested, but with-
occasion nearly similar, the same mode out reference to the present case.

TUCKER and TOWELL.

Prohibition for
suing the admini-
strator of an exe-
cutor for a legacy
devised by his
testator [grant-
ed.]

LIBEL in the spiritual court for a legacy. Defendant below pleads, that this is a legacy given by the will of *E. T.* to whom *J. T.* was executor, and this defendant is administrator of said *E. T.* and ought not therefore to answer the said libel; which plea the spiritual court have refused, and therefore the defendant applies for a prohibition, which on shewing cause was granted *per totam curiam*.

Lord Hardwicke, C. J. No doubt but the spiritual court has a general jurisdiction in suits for legacies; but the question is, whether they have in this suit as it is now brought; and I think they have not: for, if an executor dies intestate, there is no privity between his administrator and the testator, and in order to continue the privity there are administrations *de bonis non* granted, which is the constant course; now, here is a suit against the administrator of the executor, who is not administrator *de bonis non* of the first testator, so that there is no privity. But it is said that here is what amounts to an allegation that this administrator was possessed of the testator's goods, and so may be charged as executor *de son tort*; that does not appear, but suppose it had been so, that would not be a ground to maintain this suit, but in that case there should be an administrator *de bonis non* set up, and he might then call him to an account in a court of equity; for the ecclesiastical court has only jurisdiction to compel the immediate representative of the testator or intestate *to administer, and have power to grant probate, and to commit administration. But when they have done that, they are *functi officio*, and have no further jurisdiction, but as the law has indulged them to call the executor or administrator to account. And I remember where a suit was in the spiritual court to call an executor to account by a person who was neither legatee nor creditor, and the court here granted a prohibition. As to being executor *de son tort*, that is

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an appellation that is given, but they below know no such executor, for suits against such executors are against them as executors of the will; therefore the rule must be absolute for a prohibition.

Lee, J. By the stat. of 4 & 5 *W. & M.* c. 24. s. 12, it is declared that there is no privity between the executor's administrator and the first testator; and, consequently, there can be no ground to sue in the ecclesiastical court; for their jurisdiction arises from the bequest in the will, or in respect of the executor: but if the goods are in this person's hands he must be considered as trustee or debtor to the legatee. Prohibition awarded.

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SAVAGE and HADDON *versus* FIELD.

Tri. at Ni. Pri. 161.

ACTION of debt upon judgment, to which defendant pleaded under the stat. of 2 *Geo. II.* c. 20, that he was a fugitive for debt and entitled to return and surrender himself, and did surrender himself, and was duly discharged according to that act by the quarter sessions for the county of *Surrey*. Plaintiffs replied that they had no notice of his discharge, as they ought to have had by the act, and issue joined thereupon: and at the trial of the cause the evidence to prove the notice was, the duplicate of the prisoner's discharge, which says, notice having been given to the creditors: likewise the wife of the person employed to give notice, the person himself being dead; who swore that he went with an intent to give notice: also another witness who saw that person attending at the sessions, but was not in court, and so did not hear him give evidence of the notice.

The duplicate of the justice's discharge, not evidence of any fact which is the foundation of their jurisdiction.

Lord Hardwicke, C. J. This question arises upon a special issue, whether thirty days notice was given to the creditors according to the act; for the act has made the notice in the *Gazette*, and particular notice, to be both necessary. There is no clause in the act which makes the duplicate to be conclusive evidence; the duplicate says it was made appear upon oath that due notice was given, but it does not say that notice for the space of thirty days was given, which would have been much stronger, but the sessions have taken upon them *to determine that due notice was given. According to the rule of law that the best evidence should be produced, the way would have been, here, to prove the duplicate as they prove records, and then to have proved what the witness had sworn. Upon the circumstances of this case I am of opinion, that the evidence to prove the notice was sufficient. The act directs as to fugitives, that they not being prisoners at the suit of any one creditor, are to surrender themselves, &c. and their oaths are to be allowed unless the creditor disproves it; and the fugitive is to give thirty days notice; then the question is, whether such notice

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notice is necessary to found the jurisdiction of the quarter sessions, or it is only matter of proceeding; if it be necessary to found their jurisdiction, I think should the duplicate not evidence of notice, because then their judgment must be taken in a matter to found their jurisdiction: but their jurisdiction is founded on the party's being a fugitive, and applying to be discharged; but the notice seems to me to be only their manner of proceeding, and not an essential to found their jurisdiction: for the act requires the notice to be proved before them upon oath, so that they are judges thereof; and, therefore, as they have said there was due notice, I think it is sufficient. And in this case, the person that gave the notice being dead, I think it is the best evidence of notice that could be produced.

Probyn, J. As to the duplicate, it was allowed in a late case in this court to be evidence of a prisoner's discharge †.

Lee, J. I take the case to be, whether in this particular circumstance there was legal evidence of notice; for it is certain that in cases particularly circumstanced, evidence may be allowed which in other circumstances would not be allowed; as in *Thurston* and *Slutford*, *Salk.* 284. [1 *Lutw.* 905, S. C.]

Lord Hardwicke, C. J. As to matters that are to be found their jurisdiction, as if the issue had been, whether a fugitive or not, the duplicate could not have been offered in evidence; so if this notice had been to found their jurisdiction.

Lee, J. The duplicate is not to be received as evidence of their jurisdiction, any more than the certificate of commissioners of bankruptcy.

Per Cur'. The *postea* must be delivered to the defendant.

† *Vide* the case of *Gillam* and *Stirrup* in *Tris.* last, *ante*, 145.

HILARY TERM,

9 Geo. II. 1735. B. R.

PHILIP Lord **HARDWICKE**, Lord Chief Justice.

Sir FRANCIS PAGE, Knt.

Sir EDMUND PROBYN, Knt. } Justices.

WILLIAM LEE, Esq.

JOHN WILLES, Esq. Attorney-general.

DUDLEY RYDER, Esq. Solicitor-general.

The **KING** and **HOSKINS**.

The Opinion of the Court.

MANDAMUS to the defendant as late mayor of the borough of *Bossiney* in *Cornwall*, and to ——— *Lyne*, the town-clerk, and to the free burgesses to elect a mayor; and the defendant has sent the return to the crown-office, which is, that the office is full of one *Robins* who is the mayor; and this return is in the names of *Lyne* the town clerk and of the free burgesses; whereas *Lyne* disowns by affidavit that he knew any thing of making the return; and it appears likewise that the majority of the free burgesses did not consent thereto, it being alledged, and the dispute is, whether *Robins* was mayor or not. And upon a rule for the defendant to answer the matters of the affidavits, his counsel argued, that an action would not lie for that return as a false one, because of the multiplicity, none of the corporation being hurt particularly, but, that an information might be granted, and so have the return tried; but that it is no way proper for an attachment.

Lord Hardwicke, C. J. The court made the rule only for answering the matter of the affidavits in order that they might either get an information for a false return, or an attachment, as the matter

The late mayor is the proper officer of a borough to make a return to a writ of *mandamus*; and if in making such return, whether true or false, as to the matter of fact, he alledge that it is the return of others also, when in truth it is not, it is a contempt for which an attachment will be granted. *Tamen quare.*

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matter should come out; and now I am of opinion, this is a contempt in the defendant, and that therefore an attachment should issue; whether the return be good or not in law, or true in fact or no, can be no reason for [or against] this attachment, because that [such return] should be tried upon demurrer, or, upon an issue on the fact; but this behaviour of the mayor, who is the only person that can transmit the return to us, in saying this is the answer of the town clerk, and the others concerned, when it is not so, nor had proper authority to make such answer, is an imposition on the court and a contempt.

Per Cur'. Let there be an attachment.

Vide 2 Salk. 431, pl. 9. 12 Mod. 308, upon a return to a *mandamus* it was suggested, that the same was made by the mayor and by the minor part of the burgesses; but that the majority did not consent, but would have obeyed the writ, and therefore it was prayed that the return might not be received; and *per Holt*, where a writ is directed to a single officer, as a sheriff, and a return made by a stranger without his privity, he may any time that term come in and disavow it; but where the writ is directed to several, and the mayor who is the most principal and proper person returns and brings in the writ, it is not fit we should examine upon affidavits, whether there was the consent of the majority; we will take it and leave you to punish the mayor for the misdemeanour, and so the return was filed. And 2 Salk. 432, pl. 10, it was moved that the sense of the mayor differed from the majority of the corporation, he would execute the writ, whereas they were for returning an excuse, and prayed that the mayor might be ordered to deliver the writ to the rest of the corporation; *sed non allocatur*, for he is the head and principal, and take your course against him (1).

(1) The cases here cited, and the references made, seem *contra* the decision in the principal case, and point out the proper remedy against the returning officer, to be by way of information, as for a misdemeanour.

BUSBY and ELLISTON.

Demurrer to a declaration on a promissory note, wherein it was said the defendant was "summoned," instead of "attached" to answer, overruled.

PLAINTIFF declares upon a promissory note, and the defendant demurs to the declaration, and the objection made is, that the declaration says the defendant was summoned to answer, instead of saying he was attached to answer.

Dennison, for plaintiff, this is not material, for it is only a recital of the writ, and the defendant has not prayed *oyer* thereof, so that it does not appear but it might be by summons.

Lord Hardwicke, C. J. You cannot have this exception without

out having prayed *oyer* (1), but however they might amend the recital by the writ, if that were all. Judgment for plaintiff (2).

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BUSBY  
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(1) 1 *Wms. Saund.* 318. 1 *H. Bl.* 1 *Wms. Saund.* 318. (3). 1 *Doug.* 228. 250. *Ld. Raym.* 903. 1 *Bos. & Pul.* 646; see also the cases

(2) This objection, since *oyer* is no longer to be had, cannot now be made. cited, 1 *Tid.* 317.

## \*DAINTREE and JUSTICE.

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**D**EFENDANT being in custody of the sheriff of *Middlesex* upon a charge of felony,

*Draper* moves that he may have leave to charge him with *mesne* Process, viz. with a *latitat*.

*Cur'*. Be it so (3).

Leave granted to charge the defendant already in custody on a charge of felony, with civil process.

(3) *Acc. T. Raym.* 58. 1 *Sid.* 90, S. 1 *minal* process, in the custody of the  
C. 1 *Lev.* 124, 146. 1 *Sid.* 154, S. gaoler of a house of correction, the  
C. 1 *Salk.* 354. And see the cases motion was denied, 9 *East.* R. 154,  
cited, 1 *Tid.* 401, n. b. ed. 1812. *et n.*  
But where the defendant was on cri-

BILSON *versus* CHAPMAN and REYNOLDS.

**A** RULE was made last term on the motion of Mr. *Dennison*, that the defendants should shew cause against a prohibition. *Chapman* is a churchwarden, and *Reynolds* is a judge of the court of the archdeacon of *Northampton*, and a suit being there instituted at the promotion of *Chapman* against the plaintiff, for striking one in the church-yard; the judge has proceeded to sentence of excommunication upon the statute of 5 & 6 *Edw.* VI. c. 12, which statute was suggested for the present plaintiff. And *Dennison* likewise cited the case of *Dyer* and *East*, 1 *Ventris*, 146, the words whereof are thus, "where by the stat. of *Edw.* VI. "it is ordained that striking in the church-yard shall be excommunication *ipso facto*; this though it takes away the necessity of "any sentence of excommunication, yet he that strikes doth not "stand excommunicated, until he be thereof convicted at law, and "this transmitted to the ordinary."

Where the judge of the ecclesiastical court has proceeded to sentence of excommunication under the stat. 5 & 6 *Edw.* VI. c. 12, a prohibition on the ground of no previous conviction having taken place, was refused.

The stat. of *Edw.* VI. has three clauses; the 1st is, that if any person shall by words only, quarrel in any church, or church-yard, it shall be lawful for the ordinary upon his conviction by two witnesses to suspend him, if a layman, *ab ingressu ecclesie*, and if a clerk,

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clerk, from the ministration of his office. The 2d clause is, that if any person shall smite or lay violent hands upon another in a church, or church-yard, that then, *ipso facto*, he shall be deemed excommunicate. The 3d is, that if any person shall maliciously strike another with any weapon in a church, or church-yard, or draw any weapon with intent to strike, the same person being convicted by verdict, or confession before justices of assize, shall be adjudged to have one of his ears cut off, and besides be and stand, *ipso facto*, excommunicated.

\*And now this term Serjeant *Eyre* shews cause. As to the case in *Vent.* [146,] of *Dyer* and *East*, if that were upon the 2d clause of the act, it cannot be law, because it takes away the necessity of a sentence of excommunication without which no excommunication can be; and, therefore, it seems, rather, to be a case upon the 3d clause, which requires a prior conviction. And he observed, that the word *striking* is in the case, which is the word of the 3d clause, whereas *smite* is the word in the 2d clause.

The jurisdiction of the ecclesiastical court must be returned by the act, because it gives a punishment which they only, can inflict.

That the ecclesiastical court have original jurisdiction in cases of this nature, he cites *Hutton's case*, *Latch*, 116; where it is allowed that the bishop may, for the peace of the church, grant an inhibition.

The church-wardens have power over such offences in the time of divine service, and yet the party may be also indicted.

It does not follow because the temporal courts may proceed in it, that therefore the ecclesiastical jurisdiction is taken away; for the act of uniformity does not take away the ecclesiastical jurisdiction. *Caudrey's case*, 5 Co. (1). Cites a case of *Skreen* and *Pockrant* (1), which was in the Common Pleas, *Trin. 3 Geo. II.*; suit was in the ecclesiastical court for a church rate against a quaker, and of such a value as the justices of the peace are allowed by the stat. *Will. III.* to determine; and the plaintiff above, declared in prohibition; and upon demurrer to the declaration, it was unanimously agreed that the ecclesiastical court still retained their jurisdiction.

As to the case of *Dyer* and *East*, in *Vent.* [146,] it is contrary to all the cases that have been determined upon this act, viz. *Dyer*, 275, *b*, *Forman v. Mounson*; which, though not said to be determined in the book, yet it is cited in the case of *Baker* and *Brent*, *Cro. Eliz.* 680, by *Dodderidge, J.* as a case resolving that the words of the statute, *ipso facto* excommunicated, are to be intended, excommunication after sentence, or due trial and conviction, and not before. *Cro. Eliz.* 919, *Sonham* and *Trundle*, and *Finer* and *Eaton* in *Hetley*, 86; which last is a case upon this very clause.

*Reynolds,*

(1) Probably *Skreen v. Cockernutt*, *Fortesc.* 347.

*Reynolds*, with him cites *Noy*, 104†. *Cro. Cha.* 464, *Cholmley's* case, and *Penhallo's* case, which is in *Cro. Eliz.* 231. 2 *Leon.* 188, and 4 *Leon.* 49, that he cannot be indicted upon this clause.

\*It appears by the *Register*, 49, b. 51, a. 57, b, that a consultation lies in a suit for laying violent hands on a clerk, and yet there too, it might be said that there ought first to be a verdict before excommunication.

Serjeant *Chapple*, *contra*. This is not merely a spiritual offence, for it is a breach of the peace *vi et armis*; and, wherever a spiritual offence is coupled with violence, the spiritual jurisdiction is gone; so is *Gakizard* and *Rigault*, 2 *Salk.* 552.

This is like the act which makes a deprivation *ipso facto* for simony, and there no sentence declaratory is necessary. 6 *Co.* 29, b. *Green's* case.

The temporal courts shall have the construction of acts of parliament; so *Wheeler's* case, *Godbolt*, 218; a suit for working on the feast of *St. John Baptist*, was prohibited.

*Abney* with him, cites *Cro. Ja.* 462, *Large v. Alton*†, that the spiritual court cannot give damages upon this statute.

Cites *Hob.* 246, *Smith v. Pannell*; the defendant being enjoined purgation by the archdeacon for railing and sowing discord among the neighbours, a prohibition was awarded, for the cause belongs to the leet, and § not to them.

That the ecclesiastical court may build their sentences upon the acts of the King's courts, so they may deprive a man by sentence because he is convicted of felony, &c. *Hob.* 291, *Searle v. Williams*.

In a suit for dilapidations, which is within their jurisdiction, they cannot try if covin or not; for that depends on the construction of the stat. of 13 *Eliz.* c. 10, which it vests not in them to judge of, but in the temporal courts. *Hob.* 84, *Spendlow v. Smith*. Cites *Littleton's Reports*, 152, a|| prohibition awarded to a suit for misbehaving in the church.

\*Lord *Hardwicke*, C. J. This is a very plain case, and had it not been for that very short note in *Ventris*, I should have been against granting a rule to shew cause. There are two questions in this case, 1st. Whether the ecclesiastical court has a jurisdiction at all to give sentence, or whether the party does not stand immediately excommunicate without sentence? 2dly, Supposing a sentence

† See *vide* the cases, for they do not warrant what he says.

‡ In that case a prohibition was denied in a suit upon this statute for brawling in the church-yard; it was prayed because they had given costs, and denied because costs there are *pro expensis litis*; otherwise, says the book, it had been *pro dampnis*.

§ Except, says the book, it were in the church, or the like.

|| That was a suit before the high commission court at York for non-residency, and for breaking open a pew in divine service, and other misbehaviours in the church; a prohibition went; because, says the book, the high commission cannot punish for non-residency, nor breaking the pew, and for the other things he shall be bound to good behaviour, and the complaint ought also to be before the ordinary.

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tence to be necessary, whether there ought not to be prior conviction? As to the 1st, I think they have such jurisdiction, and that there must be a sentence declaratory at least. This is not a jurisdiction claimed by force of some antient canon, or ecclesiastical law, and not given away by some statute which has no saving thereof; but the statute says, that for such a fact, a man shall be, *ipso facto*, excommunicate; so that their jurisdiction arises from the statute itself; then the question is, whether they can proceed to give sentence? And I think they can; for in no case upon any act of parliament which says, a man shall be excommunicate *ipso facto*, but there needs a sentence declaratory; as well, as if an act says a man shall suffer death, there must always be a conviction. Besides, how could such an excommunication, without sentence, have effect, since no *excommunicat' capiend'* can issue without a *significavit*? And who can make a *significavit* but the ecclesiastical judge? and how can he do so but upon some proceedings before him? So that I think the case in *Ventris* as to that point is mistaken. As to the 2d question, it depends on the construction of the act, viz. the 2d clause, and nothing there, requires a precedent conviction; whereas, if a sentence be necessary it must be upon a due proceeding. It is not sufficient to say, this is a temporal offence, for, be it what it will, the act has given them a jurisdiction, and it is the same as if it had given jurisdiction to any other court: if the case had been upon the 3d clause of the act, and it seems probable that case in *Ventris* was so, then it is plain, a conviction, prior, was necessary; because the excommunication is an accumulated punishment.

Lee, J. The reason given why a sentence is necessary, is, because otherwise, the party can never be absolved.

*Per tot' Cur'*. Rule discharged.

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\*COLLINS and MUXWORTHY.

Writ of error  
 amended [in the  
 style of the court  
 to which it was  
 directed.]

WRIT of error directed to the mayor, recorder, and aldermen of the city of the *Bath*, whereas the stile of the court, as appears by the record returned, is the mayor, &c. justices of the city of *Bath*.

*Draper* moves upon the statute of 5 Geo. I. c. 13†, that the writ may be amended by the record, and had a rule to shew cause,

† The words of the statute are, (reciting that writs of error as the law then stood were not amendable) that all writs of error, wherein there shall be any variance from the original re-

cord or other defect, shall be amended, and made agreeable to the record by the court where the writ of error is returnable.

cause, and no body appearing at the day, the rule was made absolute (1).

(1) See 2 Lord Raym. 1587, and in covenant, amendment of the writ where the writ of error was brought was allowed, 5 Taunt. 82; see also 2 in case where the original action was Str. 892. 2 Cowp. 425.

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*Ante*, p. 85.

THIS cause was argued once in *Hilary* term last, by Serjeant *Darnell* for the plaintiff, and by Mr. *Abney* for the defendant.

*Page, J.* It was argued again in *Trinity* term last by Serjeant *Chapple* for plaintiff, and Serjeant *Eyre* for defendant.

For the plaintiff it was said, that the master is chargeable for things done by the servant in and about his office. *Boson and Sandford*, 1 *Shozer*, 29, 101. *Mors and Sluce*, 1 *Mod.* 85.

As to the unlawful trade, it was said that it does not appear but that it was money received, and not the gold of *Portugal*, and, possibly, that law may inflict a penalty on the owner of the goods only, and not on the owner of the ship; but however the misfeasance is the gift of this action, and therefore, possibly, an action might not lie for not taking them on board, but when he had them on board, the contract was executed, and he must take care of the goods; as to the freight being payable to the master of the ship, yet still it is a benefit to the owners, for the master has the less charges; cites *Coggs and Barnard*, 1 *Salk.* 26, upon an undertaking without consideration, held that though no action lay for not doing, yet for misdoing he is answerable.

For the defendant it was said that the unlawfulness of the trade might be put out of the case; and it was argued that the owners are not liable for contracts made by the master upon his own account; so the master may hypothecate the ship for his owners, but not for his own debt; *Bridgeman's case*, *Hob.* 11, and 1 *Roll.* 46r. 350. [(C.)], pl. 2. And though the mariners are the master's servants, yet he is not liable for their contracts. *Molloy de jure maritimo*, p. 234.

That, as there was no agreement in this case who should have the freight, it must be paid as the usage is found to be, to the master, and on this verdict that must be taken to be the custom; and if goods are sent abroad, generally, the freight must be paid as usual in such cases, *Molloy*, p. 257. That it appears from the case of *Boson and Sandford* in *Lev. Shower, Cumberbach and Carthew*, that these sort of actions do not lie against the owners

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as being the appointers of the master, nor as being owners of the ship, for then disagreeing owners would be liable, but only as receiving freight.

Lord *Hardwicke*, C. J. One thing occurs to me on reading the record, which has not been spoke to; there are few cases of this sort reported, only two principal ones, viz. *Mors* and *Sluce*, and *Boson* and *Sandford*; the first was an action against the master only, and the opinion was, that it lay either against the master or owners, and the declaration in that case is founded on the custom of the realm in general; in *Boson* and *Sandford*, as appears by *Carthew*, the declaration lays the ship to be a ship usually carrying goods for hire, and thereupon the declaration is founded. In this case the declaration is different from both; for the first count, on which the verdict is given, is, that the plaintiff caused to be delivered and laden on board the said ship several goods and merchandizes to be safely carried to *London*, there to be delivered to the said *Boucher*, he paying freight; and that the defendant having received the goods into his custody, undertook to carry them safely; and that the ship arrived, and plaintiff is ready to pay the freight, but defendant refuses to deliver the goods. Now here no custom of the realm is laid, nor that it was a ship usually carrying for hire, but a special undertaking of the defendant; nor has the verdict found any thing more: so then the question is, whether this case comes up either to *Mors* and *Sluce*, or to *Boson* and *Sandford*; for the undertaking is only thus far verified by the verdict, that the ship being in the *Tagus*, the master took the goods on board by the lading; and, therefore, it deserves to be considered, whether if a ship be sent for a particular purpose, and not in the general way of trade, the master can take in goods to charge the owners? and if so, whether something further should not have been shewn in this declaration, and found by the verdict? For on this record, if we give judgment for plaintiff, we must say that in all cases, even though the ship be sent for a particular purpose \*and not in the general way of trade, the master can take in goods to charge the owners.

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*Lee*, J. My Lord Chief Justice's observation seems to be very right, because the plaintiff should state such a case as the law and custom of the realm as to merchandize can operate upon. The owner is liable, as well as the master; in respect of such custom and of receiving freight; and the owner, as well as the master, may bring an action for the freight, and it is on that foundation that he is liable to the freighters.

It was again argued this term.

*Bootle*, for plaintiff. If this case depended only on the general question, whether the owners were liable for the neglect of the master, there are so many cases to that purpose, that there could be no doubt, but that they are so for all matters which fall within the compass of the master's employment; so that the question here is, whether there be any thing found which can distinguish this case.

Now,

Now, it is found, that the master is to take the whole freight, unless there be some special agreement to the contrary, and that there was none in this case; now, though freight be one reason, yet it is not the only reason; for the employment by the masters is another reason for making them liable; and so it is held by *Holt* in the case of *Boson and Sandford*, so *Molloy*, p. 234, 5. So that the owners are liable, even upon that head; but that it cannot be supposed, even here, that the master was, absolutely, to have the whole advantage, and that no advantage was to accrue to the owner: for, no doubt, the master received the smaller wages in respect of profits to be made this way; but, however, they are liable from the employing the master without any other consideration. As to what was said about the unlawfulness of the trade, it is sufficient to say, that it is far from being unlawful in *England*, but on the contrary is encouraged by the laws, for foreign money may be imported hither without warrant or fee. *Book of Rates*, 133.

As to the form of the declaration, that it does not alledge this to be a ship usually carrying for hire, he argues that it is not necessary; for, there are many instances of declarations without it, and possibly this may be a new ship, and yet it would be equally liable as if it had made many voyages; so likewise of a carrier that makes his first journey; so likewise drawing a single bill of exchange makes a man a trader for that purpose, and will warrant a declaration. *Show. Rep.* 123. *Carth.* 82. *Salk.* 125, pl. 2. 2 *Ventr.* 295, 310, *Comb.* 45. 152, 153. So a declaration alledging the defendant to be a lighterman is good without saying a common-lighterman; for it is the delivery that makes the contract, *Palmer*, 523, *Simonds* and *Darknell*, and the foundation of the action is the trust and recompence: so that whether this ship had usually carried for hire, or this were its first voyage, there is no difference; cites *Cro. Jac.* 262, *Rogers* and *Head*: declaration against one as a common carrier, alledging that he is a common carrier, and objected in arrest of judgment that though he is now, he might not be so at the time of the delivery of the goods, and unless he were so he cannot be charged but by a special action; and held that the action lay upon the *assumpsit* to carry safely, but not because he was a common carrier. This case, indeed, cannot be mentioned upon the defendant's *assumpsit* because there is not *quid pro quo*; but this action is founded upon the deceit in negligently carrying. He cited also 1 *Sid.* 244, where the plaintiff declared upon the custom of the realm that the defendant was a common carrier, but did not shew he was so at the time of the delivery of the goods; and, objected, that this was a misrecital of the custom; but held that the declaration is good enough without recital, and therefore a bad recital shall not vitiate, it being a recital of the common law, though a bad recital of the statute, which need not be recited, shall vitiate. He cited also a case of *Brandon and Peacock*, in *C. B. Pasc.* 3 *Geo.* 11. (1), and affirmed upon a writ of error, *Pasc.* 4 *Geo.*

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4 Geo. II., where the declaration was exactly like this, without stating that it was a ship usually carrying for hire.

Lord Hardwicke, C. J. In that case I suppose it was a general verdict upon an *assumpsit*.

Serjeant Wright, for defendant. The verdict is found on the first count of the declaration; which does not charge the defendant as having carried for hire, and therefore he must be liable by the special undertaking found by the verdict, or not at all: so the case in *Cro. Jac.* [*Rogers v. Head*], the *assumpsit* made him liable. But the question here is, whether the *assumpsit* laid be found in this case; so in the case in *Palmer*, [*Simonds v. Darknell*,] the declaration was, that he carried for hire; which is *tantamount* to alledging him a common carrier; because they must charge him as a common carrier. We do not object to the declaration as a bad declaration, but that they have not made it good. The only question is, Whether the undertaking of Lawson the defendant is found to be so by the verdict? or, Whether the undertaking found, be not the undertaking of the master of the ship? If ownership, alone, were sufficient to charge the owners, then a disagreeing owner would be liable, which he is not. *Carthew*, 63. *Comberbach*, \*117. All that is found in this case is, that the defendant was sole owner, and appointed Fletcher to be master; so that it does not appear that he was to carry for hire, nor that it was the nature of the master's employment so to do; and he might be employed in the owner's business alone, and not as a carrier to take in for hire. Indeed the master is to some purposes able to bind the owners, as for repairs of the ship; because that is necessary and arising from the nature of his office: but the contract in question does not concern the government of the ship, and the court will intend no other matter to maintain the action than what the plaintiff himself has shewn, 3 Co. 52, b. Cites *Ward and Evans*, 2 Salk. 442, that the act of a servant shall not bind his master, unless he acts by his master's authority. If a master of a ship can, in any case, contract for himself, he has done so here.

In the case of *Boson and Sandford* (1) the owners were charged as common carriers, and found to be such, and freight found to be received by them; and, that was the ground of the resolution in that case, as appears from *Salk.* 440.

Lord Hardwicke, C. J. As to myself, I have no doubt in this case; there are three questions, viz. Whether this case is different from the former cases? either 1st, From the finding in the verdict that the freight is to go to the master? or

2dly, As this is a trade unlawful in *Portugal*? or

3dly, If there be found upon the whole matter sufficient to charge the owners?

As to the 1st, I think the owners will not be discharged upon that head; for there is no difference between the freight's going to the master by the owner's special agreement, or by the custom of the

(1) Cited p. 86, *ante*.

the trade; it is the same thing; and as *Hale* says, 1 *Vent.* 239, that in effect the merchant pays the master's wages, for that it is but handed over by the owners to the master; so likewise the freighter does in effect pay the owners, for it is handed to them by the master.

2dly, I think the unlawfulness of the trade makes no difference, for it is not material to us what the law of *Portugal* is, but what the law of *England* is, and here in *England* it is not only a lawful trade, but very much encouraged.

3dly, But what determines my opinion, is this last point, which occurred upon comparing this declaration with those in *Mors* and \**Sluce*, and *Boson* and *Sandford*(1); for I think that upon this declaration taken with the verdict, judgment must be for the defendant. The question is, whether sufficient appears in this case to charge the defendant? Now he must be charged upon the custom of the realm, as usually carrying for hire, or else by his express undertaking. As to the custom of the realm, it is not now necessary it should be set out in the declaration, though all the old entries are so, but that being reckoned part of the common law, is not therefore necessary to be alledged; but yet, the plaintiff must prove a sufficient case within the custom, and upon all general verdicts [the court] will take such a case to have been proved; but this being a special verdict, we can only take the case to be as it is found; and I think the case now found, is not within the custom; for it is not found to be a ship usually carrying for hire, nor that it was employed in this case to carry according to the custom. In *Boson* and *Sandford*(2), it is laid, that the ship usually carried for hire, and the jury likewise find that it usually carried for hire, and that the plaintiff delivered the goods on board, &c. so that though it is not laid or found as the custom, yet such facts are laid and found as bring it within the custom. As to its being a new ship if that were so, yet the master would be liable, but then it must appear that the ship was employed in that voyage to carry goods for hire; for any thing that appears in this case this might be a ship sent to *Lisbon* for a special purpose, and if so, no one can say that the master, by taking in goods of his own head, could make the owners liable. In the case of common carriers, you must either set forth, that in that particular instance he carried for hire, or declare upon the custom of the realm. In the case of *Coggs* and *Barnard*(3), the great doubt was, whether some consideration should not have been laid; and the court held that the defendant having undertaken, he was answerable for the misfeasance; but that was by reason of the personal undertaking, and it would have been an action to charge the master for his servant. Nothing appears here of any personal undertaking in the owner, but only an undertaking of the servant, which can only charge the owner by the custom;

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(1) References to both, p. 86, *ante*.(3) Reference, p. 194, *ante*.(2) Reference, p. 86, *ante*.

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tom; and as to the case of *Brandon and Peacock* (1), that was a general verdict; so that the court was bound to take a sufficient case to have appeared before the jury. This is no reason why these cases should be carried any further than they have been already. So I think the defendant must have judgment.

*Page, J.* The finding, as in this case, that this was merchandize, and that freight was to be paid for it, is, indeed, evidence that it was a carrying for hire; but it is no more than evidence, and not a finding, and therefore we cannot take notice of it.

\**Lee, J.* There are no circumstances here to vary this case materially from the cases cited; if goods are put on board a trading ship, either the owners or master may bring an action for the freight; *Fry and Marsh*, cited in the margin of the case of *Boson and Sandford* (2). The delivery of goods to the master of a ship trading for hire is a delivery to the owners; but there has been no case cited where owners have been held to be liable, but upon the custom of the realm, or as trading for hire, or upon a special undertaking. Owners can never be liable but in respect of the delivery of goods to a ship trading for hire, where the delivery to the master is a delivery to the owners, and where the owners can in respect of such delivery have an action for the freight; for you must shew a benefit accruing to the person against whom you bring your action, or else a special undertaking; so that I think it is a material objection upon the face of the declaration. Court unanimous for the defendant.

*Bootle* then moved, that as the merits were with the plaintiff, he might have leave to discontinue upon payment of costs.

*Lord Hardwicke, C. J.* I do not remember any instance of its being done after a special verdict found and argued. This is not the case of an uncertain verdict, where the court take upon them to award a *venire de novo*. It has been done upon doubt even after the opinion of the court given.

*Page, J.* Did you ever know a discontinuance after a general verdict? and yet this is the same.

*Cur'.* Let defendant have judgment unless cause.

At the day given *Bootle* for plaintiff shews cause.

*Lord Hardwicke, C. J.* I have looked into this, and am satisfied that a discontinuance may be after a special verdict.

*Bootle.* It has been done after a judgment upon demurrer, 1 *Saunders*, 39(3), and frequently after argument; cites 5 *Mod.* 208, *Keat and Barker*, "It may be allowed after a special verdict and an argument at bar; so likewise after a joining in demurrer. But the stat. 2 *Hen. IV. c. 7*, ordains, that after a verdict a plaintiff shall not be nonsuit; which was otherwise at common law, for if he did not like his damages he might be nonsuit."

*Abney*

(1) Reference, p. 86, *ante*.  
(2) Reference, p. 86, *ante*.

(3) 2 *Wms. Saund.* 73, n. (1).

*Abney* for defendant. This is entirely at the court's discretion, and stands upon the same footing as granting new trials, which the \*court never does in hard actions. 2 *Salk.* 644. And this is a hard action.

Serjeant *Wright* with him, admits that it may be done after a special verdict, though not after a general one, and so is 1 *Salk.* 178, *Price* and *Parker*; but as the book says it is a great favour; and this is a hard action, being to charge the defendant upon strict construction of law, and not for any act of his own.

*Bootle* replies, That this is different from the cases of new trials, and is like cases of mistakes in the pleadings; for here this verdict was found upon a mistake; that discontinuances have been in hard actions, he cites *Jones* and *Pope*, 1 *Saunders*, 39, and 1 *Sid.* 305: discontinuances allowed after argument upon demurrer in an action of debt for an escape though the objection was made of a hard action. So 2 *Saund.* 73; leave given to discontinue in a bad action though the plaintiff had another remedy. Admits that in *Salk.* [178], it is said to be great favour, but in *Comberb.* 363, 171, it is laid down generally. And he offered an affidavit that the ship is since sold, and therefore the plaintiff has no remedy in the Admiralty court.

Lord *Hardwicke*, C. J. We must take it upon the record, and cannot go out of it; and this is not like a new trial where we go into the fact, for the special verdict is now upon record. The question is, Whether after all these arguments, and the opinion of the court given thereupon, the plaintiff may have leave to discontinue. It is certain that after a special verdict found and argued, there may be leave given to discontinue, but it is a great favour, and the courts never allow it but where very strong circumstances are, which do not appear in this case. And I think is properly compared to the cases of new trials in hard actions, which are always denied! and in *Smith* and *Frampton*, [2] *Salk.* 644, it was denied, though *Holt* said he was not satisfied with the verdict; so, [2] *Salk.* 653, *Dunkly* and *Wade*, a new trial granted where verdict for plaintiff in a hard action, though *Cur'* said, had it been for defendant they would hardly have granted it: so the court denied it in one case because it was a hard action, and allowed it in the other for the same reason. And this case is the more similar, because the legislature have altered the law in that case (which was for burning, setting fire to another's house by burning mine by accident) as well as in this, for now no such action for burning the house can be brought. Now to compare this case; it is against a master for gold lost by the negligence of his servant without any privity of the master, and the opinion of the court is, that here is not a sufficient contract laid, and the legislature have since declared that it is a hard action, and mischievous \*to the public, and therefore we have the strongest warrant to say it is a hard action, and to determine [in] our discretion to deny a discontinuance.

*Lee*, J. It is clear that there have been discontinuances after special

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special verdicts and arguments at the bar, and the opinion of the court given; and it is as clear that when the party applies for leave, that the court must have a discretion to grant or refuse, or else it might be done without asking.

Rule absolute. Judgment for defendant (1).

(1) For the principal point, this is referred to as a leading case in *Abbott*, 120. And as to the general question, see *id.* Part II. c. ii. Part III. c. v. where the authority of the master in the employment of the ship, and the limitation of the responsibility of the owners and master, are concisely yet luminously treated. And for the secondary

point, as to the practice in permitting the party to discontinue in a hard action, this case is referred to 2 *Wms. Sessd.* 73, n. 1.

The stat. 7 Geo. II. c. 15, by which the responsibility of owners, &c. in the cases there expressed, is limited to the value of the ship and freight, may also be referred to.

### BLAGNEY'S CASE.

A gentleman pensioner, being an officer on the cheque roll, is exempt from serving on juries.

AT the first sittings at *Nisi prius* in *Middlesex*, one *Blagney* was excused from serving on the jury, he being a gentleman pensioner, which is an officer upon the cheque roll (2); for per Lord *Hardwicke*, C. J. The officers on the cheque roll have an ancient privilege not to be sworn on juries (3).

(2) Or exchequer roll. Is a roll or book, containing the names of such as are attendant on, or in pay of the king, or other great persons, as their household servants. *Anno* 19 Car. II. c. 1. *Anno* 24 Hen. VIII. c. 12. 3 Hen. VII. c. 13.

*Cum.* Law Dict. tit. "Check Roll." The chequer roll is mentioned in the preamble to that singular statute, intitled, "The bill for the household," 33 Hen. VIII. c. 12.

(3) See 6 Rep. 53.

### HOPKINS, &c. NEAL and Another.

2 *Str.* 1026. S. C.

Party who supports the suit not to be a witness.

THE plaintiff being riding on horseback behind her father, was assaulted by the defendants, and thereof sues by *Wright* her next friend, she being an infant of 17, an action of assault against the defendants; and her father being called upon as witness for her was objected to, he owning, that the suit was carried on at his expence.

Lord *Hardwicke*, C. J. It is no crime in the father to be at the expence of a suit for his child; but since he is, he cannot be a witness; for he can never be reimbursed without the plaintiff recovers; because, she, being an infant, is not bound if she should promise

promise to repay at all events: and if she has no property, she might be admitted *in formâ pauperis*, for the statute only requires an oath that the person has no property (1).

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(1) See 1 Str. 506, 548, 1026, and the authority mentioned in n. (1) there, acc. Peak. 172, 188, edit. 1813.

## \* HOOD and HEBDEN.

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**FILMER** to shew cause against a prohibition in a suit for tithes; he says the suggestion is not that the tithes are not due, but that they are due to the impropriator, and the plea below is that of a *modus*. He cites 2 Roll. Abr. 310: 2 Roll. Rep. 5: that where the dispute is only between parson and vicar no prohibition lies, 2 Bulst. 157, *Draiton and Cotterill v. Smith*, in a suit for tithes, a suggestion for a prohibition was that a *modus* was payable to the vicar, and the prohibition denied, because the *modus* cannot come in question, but only the right of tithes to whom belonging, whether to parson or vicar. Cites *Drake and Taylor, Pasc. 4 Geo. I. Stra. 87*: a vicar libelled against the lessee of the rectory for tithes of turnips, and it was suggested for a libel that tithes belong to the rector, and not to the vicar, and the court would not grant a prohibition, being merely between ecclesiastical persons; and no question about the right of tithes, but only to whom payable.

Where the ecclesiastical court entertains a question as to a *modus*, prohibition lies.

*Dennison con'*. The case in *Bulst.* is † denied to be law in *Sid.* 332, and it appears here by affidavit that they are proceeding below to examine witnesses to the *modus*.

Lord Hardwicke, C. J. Upon that a prohibition must go, to declare in (2).

† It is not formally denied, but the case in *Sid.* is contrary to *Bulst.* and refers to *Bulst.* at the end of it.

(2) See *Willes*, 680.

## The KING versus PEWTERUS.

2 Stra. 1026. S. C.

**BARNARDISTON** moves that several unnecessary counts, as he calls them, may be struck out of an indictment.

Lord Hardwicke, C. J. How can we strike out any thing that the grand

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grand jury have found? We might do it in an information (1). The officer that attends the grand jury should not let such indictments come before them. It is fit a rule should be made that no indictments should be preferred to the grand jury, but by the clerks of the crown-office, and then we should know who to call upon in such cases; but, however, as it is found we can do nothing (2).

(1) But see *post*, 209.

c. 25, s. 97, and the authorities there

(2) As to amendment of an indictment, see 4 *Burr.* 2569. 2 *Hawk.* P. C.

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\* HARRIS and Ux' versus HANNA.

Where an executor declares in trover on the possession of his testator and a conversion after his death, and is nonsuit, the executor must pay costs.

UPON a rule to shew cause why the defendant should not have costs; the case was that the plaintiff and his wife, who was executrix to one *Lucas*, brought an action of trover against the defendant, and declared of goods which were in the hands of the testator in his life-time, but were after his death converted by the defendant, and when the cause came down to trial plaintiffs were nonsuit.

*Abney* for plaintiffs cites *Hutton*, 78(3), *Townley v. Steele*, where † *per Croke* and *Harvey*, in a writ of ravishment of ward from them as executors after the testator's death, upon a nonsuit they shall not pay costs. Cites 2 *Lev.* 165(4), *Bull* and *Palmer*; defendant accounted with plaintiff as executor to *J. S.* upon which account so much was due and he promised to pay; upon a nonsuit, *per* ‡ *Rainsford*, *Twisden* and *Jones*, he shall not pay costs, for the action is in right of his executorship, and the money recovered will be assets. Cites 3 *Lev.* 60(5), *Mason v. Jackson*, trover by administrator, and declares he was possessed of such goods, and lost them, and defendant converted them; and on verdict for defendant, held that plaintiff should pay no costs, because the action is in right of the intestate, &c. cites 6 *Mod.* 92, 1 *Salk.* 207, [S. C.] said *per Holt*, If executor bring trover for trover in testator's time, and conversion in his own, he shall not pay costs.

Serjeant *Eyre* for defendant: The rule is, that where the cause of action arises in the time of the executor he is liable for costs, for

† *Sed Felcerton* and *Hutton contra*. For they were named executors, and their title derived from the testator, yet the action is brought upon the immediate tort done to themselves, and so within the very words of the statute.

‡ *Wylde contra*. Because he does not sue as executor nor produce the will, but founds the action on an account with himself.

(3) [Cro. C. 29. 2 *Daw.* 225, p. 9. S. C.]

(4) [2 *Jen.* 147. 3 *Keb.* 626, 643. 1 *Freem.* 424. S. C.]

(5) [2 *Daw.* 225, p. 9. S. C.]

for he may then bring an action without naming himself executor, but where he is obliged to name himself executor I admit he is not bound to pay costs; but I submit it, that in this case the conversion is the cause of action, for it is the foundation and gist of the action, and that was in the time of the executor. As to the case in *Leo*. there the account was about the assets of the testator; and I submit it, that in the case in 3 *Leo*. [60], is not law; for, there, even, the trover was in the time of the administrator: and that resolution is, therefore, contrary to all the books. He cites 1 *Salk*. 314, where *per cur'*, In trover, by an executor, upon a trover and conversion in the time of the executor, if nonsuit, he shall pay costs; for he need not name himself executor: and the goods are assets in his hands though he never recover them. The same was held 1 *Vent*. 139, [Anony.] and *Cro. Cha.* 219, *Atkey* and *Heard*, and Sir *W. Jones*, 241. Cites *Yeates* and *Wilbeard*, *Michaelmas*, 1724; trover by executor, and the \*conversion laid in his own time; and nonsuit, held that plaintiff should pay costs.

Lord *Hardwicke*, C. J. There was the case of *Baller* and *Delander*, *Trin.* 1 *Geo. I.*†, where costs were given to the defendant, upon the distinction that my Brother *Eyre* lays down; viz. where it is necessary for plaintiff to name himself executor, and that he must bring his action in right of the testator, there he is excused: though even that has been a pretty liberal construction of the statutes for costs, because costs are given as a satisfaction and not as a punishment; but, however, that point is now settled, with the distinction as above. It used to be a ground of giving costs, or not, against executors, if the thing or damage recovered was assets; but that is now exploded; for, even, though the cause of action arise after the testator's death, yet the thing, when recovered, will be assets; so that the matter rests entirely upon the distinction laid down by my Brother *Eyre*.

*Lee, J.* The cause of action is the conversion which the executor is privy to: that case, 1 *Vent*. 109, is directly in point. There is a good case as to costs concerning executors, which is *Jenkins v. Plone*, in 6 *Mod.* 91, 181, and *Salk*. 207, the rule is, that where the cause of action arises after testator's death, the executor is liable for costs, because then he is supposed a sufficient judge of the cause to found an action.

Rule must be absolute, costs for defendant (1).

N. B. The

† Cited *Andr.* 357. *Str.* 682. 2 *Str.* 785. See *Str.* 1106. S. C. as in *Andr.* 357, but much fuller there.

(1) The question here decided has been much agitated, and although, as will have been obvious, contrary to former decisions, yet the distinction admitted by Lord *Hardwicke*, C. J. has guided the later decision upon it, and this notwithstanding the case, 4 T. R. 277, *et semb.* 3 *Leo.* 60. The later decisions which accord with the present are, 7 T. R. 358; where the doctrine recognized by *Buller, J.* 4 T. R. 277, was over-ruled. 2 *Bos. & Pul.*

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*N. B.* The statutes which give costs where plaintiff is nonsuit, or a verdict for defendant, are 23 *Hen. VIII. c. 15*, and 4 *Jac. I. c. 3*.

*Pul. 256. 2 East. R. 395, and 10 East. R. 293.*

The test of an executor's liability to pay costs or not, therefore, now is, whether in the action brought, the naming himself, or suing as executor, be necessary to his success in the action, and not as in 4 *T. R. 277*, whe-

ther the thing recovered would or not be assets. See 1 *Bos. & Pul. 445, 446*. The cases are well collected, 1 *Hullock*, 196, 200. See also *Com. R. 162. Cooke's R. 61. Bar. 132. Monkland v. De Grainge, M. 41 Geo. III. K. R. 2 Tid. 965. 2 Taunt. 116.*

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### ANONYMOUS.

Rejoinder in the paper book allowed to be amended by the draught signed by counsel.

**D**RAPER moved to amend the rejoinder in the paper book by the draught signed by counsel, and cites for authority *Cro. Cha. 144*, and *Hutton and Walker, Trin. 3 Geo. II.*

Lord Hardwicke, C. J. But the draught should first be verified by affidavit.

The other side consenting, it was ordered to be amended (1).

(1) See *Jordan and Twells*, p. 171, *ante*, and notes.

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\* The KING and INHABITANTS of OULTON.

Motion to affirm order of sessions, on the ground that, although it had been removed into *B. R.* two terms, no proceedings had been had thereon, granted, unless cause shewn before the end of the term.

**D**ENNISON moves to affirm an order of sessions which is removed into this court, for that it has been in two terms and no proceedings thereupon.

*Per Cur'*. Let it be affirmed, unless cause shewn before the end of the term.

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COX and ROBINSON.

2 Stra. 1037. S. C.

ASSUMPSIT. Defendant pleads a tender and that plaintiff refused, and that he is still ready, and thereupon brings £4 into court; plaintiff replies a subsequent demand and refusal, and thereupon issue is joined, and a verdict for defendant.

And, therefore, defendant moved to have the £4 back again; and upon a rule to shew cause,

Bayley, for plaintiff, cites 2 *Salk.* 596, *Elliot and Callow*; plaintiff after a nonsuit was allowed to take the money paid into court by defendant. He cites also *Jenner and Belinger, Michaelmas*, 6 Geo. II. where defendant to have the money back, the plaintiff being dead, and no proceedings in the cause, but refused.

Robinson. That money paid into court is an actual payment to the plaintiff, generally, in *B. R.* though in the Common Pleas it is not, but only at the peril of costs; but, here, the plaintiff has taken issue upon a collateral matter, which is a refusal of the money; and as defendant has a judgment for costs, he hopes it is equitable to stop this money.

Lord Hardwicke, C. J. It is pretty difficult for the court to come at it by equity: the defendant has a judgment and may have a proper execution; but how we can stop money in court in order to pay defendant I do not see. The question is, whether the court can order the money to be paid back to defendant upon the event of the suit; now, in strictness, it is certain that money paid into court and struck out of the declaration can never be paid back again; and, if plaintiff proves no more due to him at the trial, he must be nonsuit, or have a verdict against him: but how can the defendant be entitled to it again when he has paid it, as admitting it to be due to plaintiff?

**Lee, J.* The defendant, to be sure, is entitled to costs upon the verdict; but that must not deprive the plaintiff of a debt which is admitted to be due. The reason of paying money into court was, only, because of the trouble of pleading a tender; and it stands upon the same footing. Rule discharged (1).

After verdict in his favour, the defendant cannot be paid back money brought into court by him on a plea of tender, but it belongs to the plaintiff.

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(1) 2 *Salk.* 597. *Pr. R.* 250. *Cooke's* R. 36, S. C. 4 T. R. 10. 7 T. R. 372. 2 *Esp. C. N. P.* 481, 607. 2 *H. Bl.* 374; and see 1 *Camp.* 327, 8, acc. also 1 *Tid.* 627. But in *C. P.* if the plaintiff have a verdict against him after money is brought into court, the court will order it to be paid out to the defendant towards satisfaction of his costs. *Cooke's* R. 54. *Pr. R.* 251. S. C. *Bar.* 280.

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WALLIS and SMITH.

2 Stra. 1027. S. C.

Where the plaintiff files bail according to the statute, the defendant by the bye cannot be declared against, as where the bail filed by the defendant.

UPON the master's report the case was thus. An action was brought against a freighter by the owners of a ship, and a copy of process was served pursuant to the late statute (1) in the name of six persons as plaintiffs, and common bail filed likewise for defendant by the plaintiffs; but the declaration delivered, was in the name of four of the six only; and judgment was signed for want of a plea; a writ of enquiry and final judgment; and, at the executing the writ, one *H.* who was in fact attorney for the defendant, but whose name did not appear in the proceedings, attended: and the question was, whether this is a regular judgment.

Lord *Hardwicke*, C. J. This declaration cannot be considered as a declaration in the first action; so if it is good, it must be so as a declaration by the bye. Now the old rule [is], that where the defendant himself files bail in one action, you may deliver another declaration by the bye; but in this case the bail is filed by the plaintiff for the defendant: in the first case he is truly in custody; but in the latter, he is supposed so, though the bail [be] filed without his privity and consent. But I think that this new method of filing bail according to the late statute by the plaintiff for the defendant, ought not to make him liable to a declaration by the bye, as he is where bail is filed by the defendant himself.

Some notice ought to be taken on the bail-piece, where bail is thus filed by the plaintiff according to the act, that other plaintiffs may know how to distinguish (2).

Per Cur', Judgment set aside (3).

(1) 12 Geo. II. c. 29.

(2) This suggestion makes a part of the rule of court referred to in the next note.

(3) The distinction seems to be, that

in case the plaintiff files the bail, he only can declare by the bye. See R. M. 10 Geo. II. This case is cited 1 Tidd. 243, 306.

EYRE and MOUNT.

An entry of a *remittitur dampna* for part of the damages, good upon error, without judgment for the defendant *quod eat sine die* as to that part.

UPON a writ of error the exception was, that the plaintiff had entered a *remittitur dampna* for part of the damages; and no judgment for that part for the defendant; for that there ought to have been a judgment *quod eat sine die* as to that part.

Lord

Lord Hardwicke, C. J. What authority have you for that? there is no occasion for it, for the *remittitur* is a release for so much, and is like an acknowledgment of satisfaction.

Per cur', Judgment affirmed (1).

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(1) For law and the practice as to *remittitur damna*, see 1 *Wms. Saund.* 285, n. (5), (6), 286, n. (10).

Duchess of MARLBOROUGH *versus* WIDMORE.

1 *Str.* 890. *Fitzgib.* 193. pl. 6. *Barnard. B. R.* 408, 418, S. C. but not S. P.

JUDGMENT against the defendant in *Easter* term 1731, and he taken in execution the same term; and now it was prayed, a *supersedeas* might be granted to discharge him out of custody, for that by the rule of the court he ought to be charged in custody the same term or the next; whereas there was no *committitur* piece till *Michaelmas* term. But in fact it appeared, that in *May*, 1731, he was charged in execution in the book of the clerk of the judgments; and upon producing the roll of the judgment, the *committitur* is there entered *Pasc.* 1731.

Lord Hardwicke, C. J. There must be a *committitur* piece, where there is no record of the *committitur*, but here it appears to us by the record; and if, in fact, there was no *committitur* piece to warrant the entry, you should move to discharge the entry. The *committitur* piece is not the charge in execution, but the warrant to make the entry upon the roll; and the roll would have been the only proper proof, if this had come in question upon *nul tiel record*. *Nil capiut* (2).

(2) But now, by R. E. 41 *Geo.* III. K. B. the *committitur* on every judgment obtained against a prisoner in this court, shall be filed with the clerk of the dockets on or before the last day of the term in which the prisoner is charged in execution: and the said clerk shall enter such *committitur* on the judgment roll within four days next

after the end of such term, exclusive of the last day of term, unless the last of the four days be *Sunday*, and in that case within five days next after the end of such term; and in default thereof the defendant shall be entitled to be discharged. See *Peacock's Rules* and *Orders*, K. B.; also 1 *East. R.* 410.

Where it appeared that the defendant had been taken in execution in *Easter* term upon a judgment of that term, it is sufficient if, on production of the roll, the *committitur* is entered thereon of *Easter* term, although the *committitur* piece shall not have been filed till *Michaelmas* term: for a *committitur* piece is only necessary where there is no record of the *committitur*; and where the *committitur* piece is wanting to warrant the entry, such entry may be discharged on motion.

GALTON and WIGLEY.

SCI fa. against the bail returnable on the 31st *January*, and the principal surrendered the same day after the *sci. fa.* returned.

Parker. To stay proceedings against the bail, for that there can be no fraction of a day, and cites 1 *Roll. Abr.* 334. pl. 9.

Surrender of principal on the return-day of the *sci fa.* against the bail, held good.

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Owen and Griffith, the court will intend the surrender was made at such time as it ought to be. Cites also *Gilbert* and *Billingsley*, *Hil. 2 Geo. II.* surrender after rising of the court held to be good, because there can be no fraction of a day.

Lord *Hardwicke*, C. J. I do not say we cannot stay proceedings, but why cannot you plead it?

**Parker*. Because the plea must alledge that the surrender was made before the *sci. fa.* was returned; whereas here the whole matter may be disclosed, and the court may favour us upon motion.

Lord *Hardwicke*, C. J. I think the rule must be absolute for staying proceedings, and that without entering into the authority of the cases cited; for this case comes not up to either of them, for it is not ascertained at what hour the surrender was made, so that here was a *sci. fa.* returned and a surrender made on the same day, and therefore as there can be no fraction of a day we must take it to be good.

Per cur', Rule absolute (1).

(1) In K. B. and C. P. when the bail are sued by *scire facias*, and the proceedings are by original, they have till the *quarto die post* of the return of the first *scire facias*, if *scire feci* be returned, or if *nihil* be returned, till the *quarto die post* of the return of the second *scire facias*, to render the prin-

cipal. . Where the proceedings are by bill in B. R. the time for rendering is the return-day of the *scire facias*, and in all those cases it is absolutely necessary that the render be made *sedente curia*. *Fletcher* one, &c. v. *Aingell*, 3 H. Bl. 117, 118, n. (a). See also 1 H. Bl. 593.

The KING *versus* GREEN.

On a motion that unnecessary counts in an information be struck out, the court recommended an application to the Attorney-General for a summons to the prosecutor's attorney, to shew cause why they should not be struck out.

INFORMATION against the defendant filed by the Attorney-General for a riot, which contains 200 sheets of paper.

Taylor for defendant, moves, that the unnecessary counts may be struck out, or, that it may be referred to the master; for, it is an information filed by the Attorney-General; by the rules of the court it cannot be quashed, but the party is put to demur.

Lord *Hardwicke*, C. J. Your way should be, to apply to the Attorney-General, and he will do it, to be sure.

Taylor. We have applied, and he refuses, and says, he has a right to put in what counts he pleases.

Lord *Hardwicke*, C. J. Well! we will read it over, so mention it again in a day or two.

And, afterwards, at another day, he said to *Taylor*, we find no instances of such a motion; but, we think there should be an application to the Attorney-General for a summons to the prosecutor's attorney, to shew cause why they should not be struck out; and then, I dare say, Mr. Attorney will do what is proper (2).

Between

(2) As to amendment of indictments, see *ante*, 203, n. (2) and the authorities there cited.

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Between the PARISHES of ARMSLEY and BRAMLEY.

Bur. Set. Cas. 75. pl. 22. 2 Ses. Cas. 246. pl. 167. [S. C.]

A PAUPER went from the parish of *Bramley* where he was settled to the parish of *Armsley*, and there paid two quarters payments to the land-tax; and then he was, by an order of justices which was confirmed by the sessions, removed back to *Bramley* as the place of his last legal settlement, which orders,

Payment of the land-tax gains a settlement under 3 Will. III. c. 11. s. 3.

Clayton moved to quash upon the authority of the case of the parishes of *Okehampton* and *Kendon*, *Pasc. 7 Geo. II*; *Bur. Set. Cas. 5. pl. 3*; *Ses. Cas. 256. pl. 205*; and of *Comberb. 410*; for that payment to the land-tax gains a settlement by the *stat. 3 & 4 W. & M. c. 11* (1).

The words of the statute are, that if any person shall be charged with and pay his share towards the public taxes or levies of the town or parish, he shall be adjudged to have a legal settlement.

Wilson contra. This is not within the statute, because not a whole year paid.

Lord *Hardwicke*, C. J. The intention of the act was only to make payment to the land-tax be a sufficient notice to the parish; the only doubt that ever was upon this act was, whether the land was to be reckoned such a tax as the statute mentions, but that is now got over; and payment of two quarters is a sufficient notice. Orders quashed (2).

(1) This statute, s. 6. requires the being "charged with and paying his share towards the public taxes or levies of the town or parish."

(2) And paying the land-tax, although the tenant be allowed it by the landlord, *Burr. Sett. Ca. 415*; although now, by 35 Geo. III. c. 101, s. 4, the tenement must be of the yearly value of ten pounds. But payment of surveyor or highway rates shall not gain

any settlement, 9 Geo. I. c. 7. s. 6.; nor shall payment of the rates and duties on houses, windows, and lights, entitle the person so paying the same to a settlement, *stat. 21 Geo. II. c. 10. s. 13.* And the payment of private rates, such as for the repairs of a county bridge, *Ca. Sett. & Rem. 1.*; or for the relief of the poor of a vill is not within the *stat. Burr. Sett. Ca. 644. pl. 199.*

DALE and STEVENSON.

HOPKINS moves to change the *venue* from *Middlesex* to *Westmorland*, upon the common affidavit, that the cause of action, if any, arose in *Westmorland* and not in *Middlesex*.

Lord *Hardwicke*, C. J. We cannot do that; for it will delay the plaintiff till the summer assizes (3).

Motion in Hilary term, on the usual affidavit, to change the *venue* from *Middlesex* to *Westmorland* refused on account of delay; or to *Yorkshire*, without consent.

Then

(3) 1 Will. 138. 2 Str. 1258. 8 C. id. 1180. ecc. And see *Bur. 120.*

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Then he prayed it might be changed to *Yorkshire*, which is the nearest county into which the judges go in the lent assizes.

Lord *Hardwicke*, C. J. We cannot do that neither without consent, therefore give notice, and move it again (1).

(1) 2 *Str.* 1216, *acc.*

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*DODD and ADCOCK.

Attachment against a deputy town clerk for taking an affidavit of the cause of action, he then acting as attorney for the plaintiff, refused.

UPON application made for an attachment against one *Slater*, for taking an affidavit of the cause of action, he being a deputy town clerk, and then acting as attorney for plaintiff;

Lord *Hardwicke*, C. J. Whether this be right or wrong done, I do not see there can be any ground for an attachment; for the course of the court is, that if there appeared only a mistake in judgment, to refuse the reading such affidavit; and if it were done wilfully, then to grant an information: therefore, I think this is no reason for an attachment; though, if he acted as judge in the cause, being attorney at the same time, that would have been a ground for an information (2).

(2) See R. E. 15 *Geo.* II. 1 R. II.

The KING *versus* WRIGHT and his WIFE.

2 *Str.* 1041. [but not so full.] *Post*, 253. S. C. 3 *Bac.* Abr. title *Pauper*, (B). S. C.

On an indictment the party may be admitted to defend *in formâ pauperis*.

THE defendants are indicted for a conspiracy to charge one *Chalesworth* with perjury; and *Huyward* for defendants, that they may be admitted to defend *in formâ pauperis*.

Lord *Hardwicke*, C. J. I doubt we have not authority by the act to do it.

Lee, J. I think there is a case of this sort in one of the modern reports.

Cur': Mention it again, and see if you can find any precedents.

The case referred to by *Lee*, J. is in 6 *Mod.* 88.; it is but a short note in these words: "A feme covert was indicted by her husband for poisoning his cows with bruised glass put into their grains, and she was admitted *in formâ pauperis*, though the court said the husband could not convict her."

At

At another day,

Hayward says, he can find no case of this sort in the books but that in 6 *Mod.* but he has been informed by the clerks of the crown-office, that there was a case of one *Susan Nutty* who was admitted by Mr. Justice *Littleton* to reverse an outlawry *in formâ pauperis*.

*Lord *Hardwicke*, C. J. This might be a reasonable case to admit them if the court had authority to do it; but I do not see that we have authority, for we cannot do it but by virtue of some act of parliament, unless it was fully established by practice. The only case is that in 6 *Mod.* which is an odd case, and I do not think myself bound by that authority. The statute is the 11 *H. VII. c. 12.* the preamble whereof is relating to persons that have not ability to sue, and the provision is for persons that have cause of action, both which expressions relate to plaintiffs only, so that I do not see that we have authority to admit defendants as paupers in any case, nor do I remember any instance of a defendant so admitted; and the *stat.* of 23 *H. VIII. c. 15.* which is for giving costs upon nonsuits in the clause relating to paupers, is only that plaintiffs being admitted as paupers, shall not be compelled to pay costs, but suffer punishment, &c. Indeed in the Exchequer in information relating to the customs they do admit defendants as paupers; but then that is by the express words of the *stat.* 2 *Geo. II. c. 28. § 8.* and by the direction is to admit them in the same manner as the law directs they should admit paupers to commence actions, &c.

Lee, J. There was a case lately in which this was refused upon looking into the *stat.* of *H. VII.* These statutes of [11] *H. VII. [c. 12.]* and [23] *H. VIII. [c. 15.]* relate only to plaintiffs, and the *stat.* [2] *Geo. II. [c. 28. § 8.]* shews that the legislature were forced to make an act on purpose to help in that particular instance. See *vide Pasc. 1736.* court altered their opinion. *Post* [253].

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Dr. WALKER's CASE.

Andr. 178. in marg. 3 *Bac. Abr.* 529, 536, [3d edit.; or title *Mandamus* (B).
S. C.]

A *MANDAMUS* was directed to Dr. *Richard Walker*, vice-master of *Trinity* college in *Cambridge*, reciting that *H. VIII.* by his letters patent under the great seal dated 19th *December* in the 38th year of his reign, did erect and found the said college, and declare that the master, fellows and scholars thereof should be a corporation by the name of Master, fellows and scholars of the Holy and undivided *Trinity* within the town and university of *Cambridge*,

Where it is suggested on the face of a writ of *mandamus* directed to an inferior officer of a college, that such college is subject to the power of a visitor, the writ is *felo de se*, and will be

quashed; for where there is a visitor, the court has no power. And it is the same whether the King or a private individual be the visitor.

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Cambridge, of king *Henry* the VIII.th's foundation, and should behave themselves according to the statutes to be then after made; which said letters patent the said master, fellows and scholars did accept of and agree to. And that king *Edward* VI. by his letters patent dated 8th *November* in the 6th year of his reign, appointed certain statutes whereby *int. al.* it was ordained that the bishop of *Ely* should be visitor of the said college. And queen *Elizabeth* by letters patent dated the 4th of the calends of *April* in the 2d year of her reign, *established certain statutes whereby *int. al.* in the 40th chapter of said statutes it was ordained, that in case the master of said college should at any time be examined before the visitor the bishop of *Ely*, and be lawfully convicted before the said visitor of dilapidations of the goods of said college, or violation of the statutes, he should without delay be deprived of the office of master by the vice-master of said college, and that without appeal, and that a cause of office was lately depending before *Thomas* Lord Bishop of *Ely*, then and still visitor, at the promotion of *Robert* *Johnson*, clerk, one of the fellows of said college, against *Dr. Richard Bentley* master of said college, for dilapidation of the goods of said college and violation of the statutes, wherein several articles were exhibited for that purpose, and that a prohibition and afterwards a consultation was awarded upon the said articles to the said bishop of *Ely* the visitor. And that the said bishop of *Ely* the visitor, having considered the evidence on both sides, did adjudge as visitor aforesaid, that the said *Dr. Richard Bentley* was guilty of dilapidation, and violation of the statutes, and thereby incurred the penalty of deprivation of his office, which said sentence is still in full force. And that it is the duty of the said *Richard Walker* as vice-master, to execute the said sentence by depriving the said *Dr. Richard Bentley* of his office of master. And that the said *Dr. Walker* having had due notice of the sentence, and being duly required to deprive him, neglects and refuses to do it. The writ therefore commands him without delay to deprive the said *Dr. Richard Bentley* of the said office of master of the said college, and of all the privileges, emoluments and advantages thereto belonging, or to signify cause to the contrary.

Dr. Walker returns, that *H. VIII.* did found the said college, and make it a corporation as set forth in the writ, saving a right to the crown to appoint a master, and that they should conform themselves to the statutes. That *H. VIII.* died without making any statutes; that *Q. Elizabeth* by letters patent established certain statutes, whereby in the 40th chapter of said statutes it was ordained in the words following, viz. (and so sets it out *verbatim*) and *int. al.* thus, That if the master should be negligent, &c. *Cum omni lenitate admoneatur, et si admonitus non se emendaverit secundo similiter admoneatur, si autem neque tum quidem resipuerit vice-magister et reliqui seniores, vel major pars eorum rem omnem visitatori episcopo Eliensi qui pro tempore fuerit aperiant, qui et eum diligenter cognoscat, et cum equitate definiat Et si coram dicto*

dicto visitore de, &c. legitime convictus fuerit, sine mora per eundem vice-magistrum officio magistri privetur, &c. and that the master, fellows and scholars of said college have been governed by the said statutes ever since, and by no other whatsoever. He further returns, that the letters patent of *Ed. VI.* mentioned in the said writ upon the acceptance of the said statutes of Queen **Elizabeth* were cancelled: and that the statute ordaining the bishop of *Ely* to be visitor was abrogated and made void, and that no other statute was granted by the said queen, or any of her successors, to said college, whereby the vice-master was subject to any visitatorial power, other than that of the said queen and her successors as general visitors of the said college. He further certified that the said *R. Bentley* is master of the said college, and that the cause of office mentioned in the writ was founded on a certain citation made by the said bishop on the 3d of *April*, 1729, which was directed to the said *Dr. Bentley*, and citing him by virtue of a citation therewith shewn unto him, under the seal of the said bishop of *Ely*, and as such visitor specially appointed by the 40th chapter of said statute of *Elizabeth* to examine the master of said college, it cited him to appear before the said bishop to answer certain articles touching dilapidation and violation of the statutes of said college, &c. which would be objected before his lordship as visitor of the master of said college for the time being, at the promotion of *Robert Johnson*, clerk, &c. which citation he sets out *verbatim*. That the said bishop of *Ely* did compel the said *Richard Bentley* to appear, and thereupon, as visitor specially assigned by the said statute, exhibited against him the said articles mentioned in the said writ. He further returns, that after a prohibition had been granted, inhibiting the bishop from proceeding on said articles, and a consultation awarded to let him proceed as to the articles of dilapidation and violation of the statutes, viz. 27th of *April*, 1734, the said bishop, as visitor specially appointed as aforesaid, did give sentence against the said doctor, which follows in these words, viz. *We Thomas* bishop of *Ely* and visitor specially appointed by the said 40th chapter, &c. to examine the master of said college; having in a certain cause of office depending before me as visitor aforesaid, examined the evidence on both sides, do adjudge as visitor aforesaid, that the said *Dr. Richard Bentley* as master of said college is guilty, &c. which sentence he sets out *verbatim*. He further returns, that by reason the said college was of *K. Hen. VIII.*th's foundation, the now king is general visitor thereof, and as general visitor hath undoubted authority to cause the said sentence of deprivation to be executed by the vice-master of said college, and on his failure to punish him, as to the said king as general visitor shall seem meet, and that he the vice-master of said college is not subject to any jurisdiction whatsoever in the premises aforesaid, other than the now king as general visitor; and prays judgment if he ought to give any other answer to the said writ, and whether this court will further intermeddle in the premises.

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This being set down in the paper, was argued by *Wynne* for the *mandamus*, and by *Strange* against it.

**Wynne* admits, that upon this return the king must be allowed to be visitor; but the question is, whether, admitting the king to be visitor, the vice-master be accountable to none besides the king.

This court has superintendency over all courts, and therefore can compel them to execute justice, as well as restrain their intermeddling where they have no jurisdiction; so is *Palmer* 50, and 2 *Roll. Rep.* 106; and he likewise cited several instances of *mandamuses* granted by this court, as *Hil.* 3 *Geo.* I. a *mandamus* to the quarter-sessions to command them to give judgment for abating a nuisance. *Andr.* 183. 3 *Buc. Abr.* 535. 2 *R. Raym.* 1334. *Ses. Cas.* 248. *Michaelmas*, 3 *Geo.* I. *mandamus* to the court of the corporation of *Sandwich* to give judgment in a cause of assault and battery. *Stra.* 113. *Michaelmas*, 7 *Geo.* I.; *Bayly* and *Boorne*, *mandamus* to the sheriffs of *London* to give final judgment upon a writ of inquiry. *Stra.* 392: *Fortesc. Rep.* 198: *Ses. Cas.* 249. *Michaelmas*, 11 *Geo.* I. *Smith* and *The Bailiffs of Andover*, *mandamus* to proceed to judgment in a cause before them. *Barnard. B. R.* 159: *Andr.* 184: *Ses. Cas.* 248. *Michaelmas*, 2 *Geo.* II. *mandamus* to the mayor of *Liverpool*, to call a common council in order to sign corporation leases. *Barnard. B. R.* 82. *Michaelmas*, 7 *Geo.* I. *mandamus* to the university of *Cambridge* to proceed to the choice of a *Regius professor*. 1 *Lev.* 119. *mandamus* to restore an alderman to his precedency; and if the justices of any court delay the party from judgment, there may be a writ *de procedendo ad judicium*. *F. N. B.* 240. It is frequent for courts of justice to assist one another; so the court of Admiralty will assist foreign courts of Admiralty, *Hob.* 12, 112. *Vent.* 32. *Carthew*, 32. *Roll. Abr.* 530. *pl.* 12. It is upon the same principle that this court removes the proceedings of inferior courts by *certiorari* in order that execution may be done, and the reason given in the books is the general jurisdiction which this court has. *Style*, 9. *F. N. B.* 242. And in the same book, *fo.* 246, it is said that such writ lies even to this court; so courts of equity will assist courts of law in granting injunctions, &c. and will even help the ecclesiastical courts. 2 *Ventris*, 345.

[*Lord Hardwicke*, C. J. Yes, in suits for payment of alimony, but I never knew it carried further.]

The case of *Powis* and *Andrews*, which was in *February*, 1723; there the executor was ordered by the ecclesiastical court to bring the money into court; but upon appeal to the delegates, they were of opinion the court had no such power, whereupon the party filed a bill in Chancery praying the lord chancellor's assistance, and the bill was demurred to; but lord chancellor over-ruled the demurrer, *and the house of lords affirmed the chancellor's order. This court has interposed where there was a visitor, as for the *Regius professor* mentioned above, and in the case of *Dr. Bentley* in the 9 *Geo.* I. *Stra.* 557: *Fortesc. Rep.* 202: *Andr.* 176: 8 *Mod.* 148: where

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where a *mandamus* was granted to restore him to his academical degrees; so in *Baketon's* case, cited in *Patrick's* case, *T. Raymond*, 109: *mandamus* to the university upon their refusing to let him take his degree. He cites *Skinner*, 644: an information in Chancery by the Attorney-General, at the relation of the clerks, brothers and sisters of *St. Katherine's Hospital v. Sir James Butler*, master thereof, for misdemeanors in his office, and praying that they might be quieted, settled and relieved in the premises; the defendant pleaded, that the queen of *England* is patroness and visitor of the said hospital, and when there is no queen the kings have visited, and so insisted that the chancellor had no jurisdiction, but that the visitation belonged to the queen dowager; and the chancellor took time to consider whether the plea should be allowed.

[*Lord Hardwicke*, C. J. But nothing was done therein, for *Lord Somers* visited afterwards at the promotion of one *Garret*.]

This application is to prevent a failure of justice. Do not dispute *Dr. Widdrington's* case in *T. Raymond*, 31; but that this differs, for here, the visitor has done his duty; but there, no application had been made to the visitor: nor what is laid down in *Phillips* and *Bury*, in *Skinner*, that the visitor's sentence is conclusive, but here, there is a sentence of a proper visitor unreversed; and the only reason given against this *mandamus* is, that there is a general visitor; but he argues, that the king as general visitor cannot compel the execution of such a sentence as this, for he has plainly parted with his right of visiting the master, and has reserved no appeal. The crown, in matters of patronage and visitation, is to be considered as a subject; so it was laid down in *Dr. Bentley's* case, *Pasc.* 5 *Geo.* II.; and in the case of *Manchester college*, *Pasc.* 1 *Geo.* II.; and the founder, though a subject, shall visit as well as the king, *Co. Lit.* 344. If the founder parts with his power, he cannot afterwards resume it, *per Holt*, in *Phillips* and *Bury*, *Skinner*, 484. Supposing one visitor should refuse to intermeddle, the party would then be without remedy; or supposing in any after case, the bishop of *Ely* should refuse to intermeddle, and refer the party to the crown as general visitor, even then the king could not interfere, because he has transferred his authority, and cannot resume it, so that there would be no remedy but by a *mandamus* from this court. That this case is not unlike that case of *Manchester college*, where it was held that the bishop being party could not interpose as visitor, and the court then granted a peremptory *mandamus*; the bishop of *Chester*, who was the visitor appointed by the charter, was at that time warden also of the college; and the statute of 2 *Geo.* II. c. 29, was made to enable the king to visit during such time as the wardenship and visitatorial power were united in the bishop of *Chester*, which shews he had not power otherwise.

Strange, contra. The first question is, whether this return be sufficient

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sufficient to prevent a peremptory *mandamus*? The substance of the return is, that the college is of royal foundation, and the king general visitor; all visitors are created by the founder, or by the law if he be silent. And it is on the same foundation that the patronage of livings has been grounded; cites 1 *Shower*, 74: and *Phillips* and *Bury*, *Skinner*, 454, per Serjeant *Eyre*, Justice: and *ibid.* 474, per *Gregory*, Justice, that if there be a visitor this court will not interpose by *mandamus*; so *Carth.* 92: *Parkinson's* case: and *Appleford's* case, cited there by *Holt*, and *Carth.* 168, *Prokurst's* case: and the case of *Wilkins* and *Mitchell*, *Trin.* 10 *Will.* III. where the court refused to grant a *mandamus* for a mayor of a corporation to execute a judgment there given, because there lay a writ *de executione judicii*: and in the case of *Manchester* college the court declared, that they would not have granted a *mandamus* if there had not been a visitor in being at that time. So in *Sayer* and *Newton*, *Trin.* 1 *Geo.* II. suit in the Admiralty, for a prize, and the court refused to award a *mandamus* to the judge to grant a monition, because they presumed that the judge would do right. In the case of *Birmingham* school the king is to visit by commission to particular persons; and by the *stat.* 3 *Hen.* V. c. 1, the king may grant commission to the ordinaries to visit. In the cases cited by *Wynne*, there was no other remedy but to apply for a *mandamus*, as in *Bentley's* case it did not appear that there was any visitor; and it is begging the question to say, here will be a failure of justice if the *mandamus* be not granted; for they may apply to the king as visitor of the vice-master. But, putting the return out of the case, for though it be bad, yet the writ may be quashed if that be bad, 1 *Sid.* 14†; and this writ is bad: it is *felo de se*, for it sets forth that the bishop of *Ely* is general visitor of the college; and therefore he may cause the sentence to be executed, and so no occasion for a *mandamus*, for this court will not interpose where there is a visitor who has the power of executing. But supposing this court will intermeddle, and after all, the vice-master should refuse to obey, it can only punish him by fine and imprisonment, which the visitor himself may do. If this court has any jurisdiction in this case, yet they cannot come hither *per saltum*, but should first apply to the general visitor, as was determined in the case of the *Isle of Man*.

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*Lord *Hardwicke*, C. J. There are two things which seem to be aimed at by this writ and return, which I do not see that the court can do: 1st, To aid the jurisdiction of the bishop of *Ely* as visitor; and 2dly, To determine that the king is general visitor. This general rule must be admitted, that if there be a lay foundation, the visitor has the sole and entire power to execute justice, and all the cases of applications to this court for admitting fellows have been

† Though a return to a *mandamus* is bad, yet if the writ is bad it may be quashed, and no peremptory *mandamus*.

been refused if there has been a visitor. I do not know any instance of the court's granting a *mandamus* to a visitor to execute his power, though at the same time I do not know but the court might do so, for it is a kind of jurisdiction; but however it is but a *forum domesticum*, and not taken notice of by the common law. This court only issues writs of *mandamus* for executing that authority which the party has, and I do not know they have ever been granted in aid of any jurisdiction. As to the cases of electing a *Regius professor*, and for restoring Dr. Bentley, it did not appear in either case that there was a visitor; and if the parties concerned will not shew that there is a visitor, this court cannot take notice that there is, because all visitatorial powers are of a private nature, and there is no difference whether that power be in the crown or in a subject, for it is a private right in either, and in such case a *mandamus* must of necessity be granted, as well where the crown, as where the subject is concerned. But, however, in this case, the writ is *felo de se*, for it suggests that the bishop is visitor of the college, and the return will not help it. So then, is there any case where a general visitor has come to this court for us to help him to visit his college? In the case of *Phillips and Bury*, it was held, that the sentence of the general visitor makes the place void, so that an action will lie for *mesne* profits. So then, if this writ be *felo de se*, the bishop is taken to be visitor and judge, and the vice-master is only a minister to put his sentence in execution. And, can it be said that ever any *mandamus* went to an officer of an inferior court to compel him to do his office? No sure, for if the inferior officer will not do his duty, the judge of the inferior court must turn him out; and this objection is the same whether the bishop or the king be visitor in this case. And no defect of justice will ensue for want of a *mandamus*; for if the bishop be visitor, as the writ suggests he is, then he may visit, or remove, or punish the vice-master, and we could do no more. And, if the king be visitor, you may apply to the king for him to visit; so that I am very clear that this return should be allowed, or that the writ should be quashed.

Lee, J. It is now a settled rule since the case of *Phillips and Bury*, that in these kinds of eleemosynary bodies, the visitor has the sole power, and they are bound to obey him, as the members of a family are bound to obey the master(1), so that the only question is, whether it appears upon the proceedings that there is a visitor? The party who would have a peremptory *mandamus*, has shewn, that the bishop is general visitor, and consequently that the court has not a power to grant it; so that the writ is *felo de se*.

Cur', Took time to consider whether the writ should be quashed, or the return allowed.

And, on the last day of the term, they gave judgment, that the writ should be quashed; but said, they did not intend it should be understood,

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(1) Quoted 2 T. R. 320.

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understood, that they had thereby determined whether the king, or the bishop, is general visitor (1).

(1) It does not appear to have been here determined, whether, in the event of a visitor not exercising his visitatorial power, a *mandamus* would lie to compel him; but it now seems settled that it would. See 2 T. R. 838, n. 5 T. R. 475. But so that the visitatorial power be exercised, the court will not further interfere, however erroneous such exercise may be. *Id.* The rule does not extend to where the de-

cision of the visitor is not within his visitatorial function. 2 T. R. 290. And further, as to where the court will or will not interfere as to acts done by a visitor, see the case of *Phillips and Bury*, 2 T. R. 346. And as to what delegated powers do not constitute a visitor, so as to exclude the application of the powers granted by stat. 45 *Eliz.* c. 4, see 8 *East. R.* 221. See also 1 *Va.* 472.

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2 *Str.* 1002, S. C. but not S. P. *id.* 1028. 2 *Barnard.* B. R. 183. *id.* 374, S. C. but not S. P. *Tri.* at *Ni. Pri.* 131. S. C. 2 *Kel.* 165, pl. 139. *Andr.* 110, S. C. but not S. P.

Where an executrix pleads certain outstanding bonds given by her testator, the day of payment of the sums mentioned in the conditions of which is past, and pleads other outstanding bonds, the day of payment of the sums mentioned in the condition of which is at the time of the plea to come, the penalties of those bonds in which the day of payment is past, and the sums mentioned in the conditions of those in which the day of payment is to come, are liens on the assets.

If the matter appearing by a special verdict be

sufficient upon the whole to found a judgment, the court may so mould such matter as to give a proper judgment, resulting from the whole taken together: therefore where assets in gross were found by a special verdict, the court may sever the gross sum so found by the jury as assets, and attach a lien thereon for the penalties of one set, and for the sums mentioned in the conditions of the other set of outstanding bonds.

PLAINTIFFS declare upon several counts in *assumpsit*, for several sums lent, and had and received to the plaintiffs use by the testator, to the amount of £31,432: 10s. and, then, there is a count in the declaration (upon which the verdict was found) for £32,000 had and received to the use of the plaintiff *ad dampnu'* of the plaintiffs £35,000. Defendant pleads a judgment recovered, and several bonds and articles with penalties unsatisfied, and, particularly, a bond entered into by testator to Sir William Morrice, bart. dated 6th of March, 1727, in the penalty of £53,000, conditioned for payment of £26,000, in manner therein mentioned, viz.

£5000 and interest for the whole on the 24th of June, 1728.

£5000 and interest for £16,500 on the 24th of June, 1729.

£5000 and interest for £11,500 on the 24th of June, 1730.

£5000 and interest for £6500 on the 24th of June, 1731.

£5000 and interest for £1500 on the 24th of June, 1732.

And £1500 and interest on the 24th of June, 1733.

And if default should be made in payment of any or either of the said sums, or any part thereof at the times therein limited, that then the said bond should be in full force: and she avers, that the two last payments of £5000 and of £1500 and interest have not been made, and that the bond remains in full effect, and not cancelled or satisfied; and another bond entered into by the testator to

to *Thomas Wilson*, dated 27th of *July*, in the 4 *Geo. II.* in the penalty of £5000, conditioned for payment of £2500 upon the 27th of *July*, 1731, which she avers is still unpaid. And another bond entered *by the testator to *Duncan Campbell*, dated 25th of *March*, 4 *Geo. II.* in the penalty of £3000, conditioned for payment of £1500 on the 1st of *May* then next, which she likewise avers is still unpaid; and she pleads *plene administravit* in this manner, “ Et eadem Catharina ulterius dicit, quod ipsa plene administravit “ omnia bona et catall’ quæ fuer’ præfat’ Humfredi tempore mortis “ suæ in manibus ipsius Catharinæ administrand’ præterquam bona “ & catall’ ad valenc’ mille libr’ quodq; eadem Catharina non habet nec die exhibition’ billæ præd’ ipsor’ gubernat’ et societat’, “ nec unquam postea habuit aliqua bona seu catall’ quæ fuer’ præfat’ Humfredi tempore mortis suæ in manibus ipsius Catharinæ “ administrand’ præterquam bona & catall’ præd’ ad valanc’ præd’ “ mille libr’ quæ solution’ & satisfaction’ seperal’ denar’ præd’ per “ seperal’ script’ obligator’ articulos & judic’ præd’ debit’ & “ solubil’ onerat’ & obligat’ existunt Et hoc parat’ est verificare “ Unde pet’ judic’ si præd’ gubernat’ & societas action’ suam “ præd’ inde versus eam habere seu manutenere debeant,” &c. Plaintiffs reply, “ Quod præd’ Catharina die exhibition’ billæ “ præd’ ipsor’ gubernat’ & societat’ habuit divers’ bona & catall’ “ quæ fuer’ præd’ Humfredi tempore mortis suæ in manibus suis “ administrand’ ultra bona & catall’ sufficien’ ad satisfaciend’ seperal’ denar’ præd’ per seperal’ script’ obligator’ articul’ & judic’ “ præd’ debit’ & solubil’ unde præd’ Catharina dampn’ sua præd’ “ eisdem gubernat’ & societat’ satisfecisse potuit, viz. apud London’ præd’ in paroch’ & warda præd.” And issue is joined thereupon; and at the trial the plaintiffs allowed the defendant to cover assets for the penalties of all the bonds and articles except those particularly mentioned above, and on which only the plaintiffs made objection; and the jury found a special verdict to this effect.

That the testator was at his death indebted to the plaintiffs in £28,993 : 8s : 1d. for money had and received to their use.

That the money due on Sir *William Morrice’s* bond, *Wilson* and *Campbell’s* bonds, for the sums in the conditions and for interest, together with the penalties of all the other specialties and judgments pleaded, amounts to £22,182 : 10s.

That at the time of exhibiting the plaintiff’s bill the defendant had assets in her hands to the value of £41,152 : 2s : 5d.

That there was justly due and owing on Sir *William Morrice’s* bonds at the testator’s death for the sum in the condition and interest £6830, for principal and interest on *Wilson’s* bond £2520, and for principal and interest on *Campbell’s* bond £1540.

*That at the time of exhibiting the bill, the defendant had not assets to discharge the penalties of said three bonds.

That deducting the above £22,182 : 10s. out of the assets found as above, there remains in her hands at the time of exhibiting the bill £18,969 : 12s : 5d. liable to the demand of the plaintiffs, if the

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the penalties of the said three bonds ought not in this case to be allowed as charges upon the assets.

But whether they ought to be so or not, the jury pray advice of the court; and if they are not, they find for the plaintiffs damages £28,993:8s:1d. costs 40s. assets to the value of £18,969:12s:5d.

If otherwise they find for the defendant.

They find every thing else necessary to bring the merits in question.

N. B. The declaration was of *Hilary* term, 1731.

This verdict was several times argued at bar, in *Easter* term last by *Strange* for plaintiffs, and *Bootle* for defendants; in *Trinity* term by Serjeant *Eyre* for plaintiffs, and Serjeant *Chapple* for defendant; and in *Michaelmas* by *Marsh* for plaintiffs, and *Dennison* for defendant.

Strange argued, That the defendant upon this plea and replication can cover no more assets on the three bonds than for the sums due upon the conditions; that she ought to have pleaded these bonds, as single bonds, without setting forth the condition, and that is the method which chiefly occurs in the reports, and then plaintiffs must have over-reached the penalties, because the court could not have gone out of the record to consider them as penalties only; but, as that method used to drive the creditor into a court of equity to discover what the real debt was, therefore the courts of law encouraged another method of pleading, either for the defendant to set forth the condition in the plea, as the defendant here has done, or else for the plaintiff to reply that the penalties or judgments were kept on foot *per fraudem*, and upon such an issue they allowed slight evidence to shew a fraud; so that if one judgment was falsified all the judgments were taken to be falsified likewise, *Carthew*, 196, 431. That the courts recommended this way of pleading, he cites 1 *Vent.* 354, [*Page v. Denton*], and *Parker* and *Atfield* (1). That though in the plea she does not say no more is due than the sums in the conditions, yet it must be taken to be so, because *ambiguum placitum accipiendum est proferentem*. *Co. Lit.* 303, b. That the replication *here is good, because in all replications, except *nul award fait*, and that replication of *nul award* depends on a particular reason; it is sufficient to meet the plea and falsify the excuses made therein, *Salk.* 138, *Meredith* and *Allen*; now this replication has done so. That the penalty is not to be absolutely taken as the debt, he cites *Tully* and *Sparkes*, 2 *Str.* 868. *Pasc.* 3 *Geo.* II. where the question was, what was the meaning of the word debts in the bankruptcy act? and the court held it meant a demandable and justly due debt.

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Bootle argued, that this case must be taken according to the strict rules of law, and as it stands upon the pleadings as they are, and not as they might have been pleaded. Now the issue stands thus,

(1) 1 *Ld. Raym.* 678.

thus, she pleads that she has fully administered, except *quæ ad satisfaciend' denar' præd' per script' obl', &c. solubil' onerat' existunt*: and the replication is, that she *habuit bona ultra bona sufficient' ad satisfaciend' denar' præd' per script' obl', &c.* So that the issue is, whether she had assets *ultra* the sums in the bonds, &c. and that cannot be referred by the rules of law to any sums but the penalty, for every bond is a debt immediately. *Stevens and Lofting, Michaelmas, 7 Geo. II.* and the expediency of pleading will not alter the law. That the penalties are pleadable whether the conditions be due or not. *1 Roll. Abr. 925. Lit. 2, pl. 2 & 4, and 3 Lev. 368, Thompson and Hunt.* The plea says that the bond is not satisfied, which as the replication does not deny, consequently confesses according to all the rules of pleading.

He cites *3 Lev. 368* (1) likewise to shew that the penalty is a protection for so much of the assets, unless it appears to be kept on foot *per fraudem*. That in the case of *Vent. 354*, there is this difference from the present case, viz. that there the executor pleaded the testator indebted to himself, and therefore he was bound to take only what was justly due, but where the debt is to a stranger he may always claim the whole, and there is only relief in equity. He cites *Cro. Cha. 362, Goldsmith and Sydnor*; that a bond for payment of money is pleadable as a debt *in presenti* even before the day of payment, though it be otherwise of a bond for performance of covenants.

Lord Hardwicke, C. J. I do not think the question now is, whether in strictness the penalty is the debt, but what must be adjudged to be debt upon the pleadings, as they are in this case. The issue is, whether she has assets *ultra* what will satisfy the sums aforesaid payable by the bonds, &c. so that the question is, whether the penalties of the bond, or the sums in the condition, are meant by the words sums aforesaid. The modern way of pleading is for the defendant in the plea to set out the bonds with the conditions; but *sure that seems to be an argument against the defendant in the present case; for the reason of introducing that method was that the truth might appear. I think it would be most unnatural, when she herself has pleaded that so much is due, for us to lay any weight on her not having said, and no more, unless it appears from the whole, that we are to take the penalty to be the debt; and if we are to take that to be the debt in this case, there is no use in pleading fairly, and she might as well have pleaded as they used to do, and then the plaintiff must have craved *oyer* and replied *per fraudem*; therefore the question is, whether this replication should have shewn that the obligees were willing to take the sums in the condition? But no case has been shewn, where the plea sets out the condition, that it should say that and no more is due, or that the plaintiff should reply specially,

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cially, and I should be glad to see a case of that sort; as to *Page* and *Denton*, 1 *Vent.* 354, as *Bootle* observes, it is not an authority in this case; for there it was a plea of retainer; and, when the executor had as much in his hands as was sufficient for the just debt, it was considered as a payment of the bond: but, still it shews, that in these kind of pleadings the court is not in all cases bound to take the penalty to be the debt in law. It is pretty strong for the court, when the defendant has claimed what is to satisfy so much as due, to presume that more is due. And it is considerable that since the case of *Thompson* and *Hunt*, in *Lev.* (1), the court, by a general law, viz. the statute for amendment of the law is bound to take notice that the sum in the condition may be the debt. As to the want of an averment in the replication, that the obliges were willing to accept a less sum, do but consider what is the evidence required of such willingness; only to shew that it is a bond with a condition for a less sum.

Serjeant *Eyre*, in his argument, cites no new cases.

Serjeant *Chapple*. That the penalty is the legal debt, for a release of actions discharges the penalty, though made before the condition due. *Co. Lit.* 291. 8 *Rep.* 153, a(2). 1 *Brownlow*, 62.

That the sums in the condition are deemed parcel of the penalty, 1 *Roll. Rep.* 405, *Robinson* and *Francis*(3). That there is difference between obligation with a condition annexed, and obligation with a defeazance made afterwards, *Cro. Eliz.* 755. 1 *Inst.* 207. That if several penalties are pleaded, and assets only enough for one, the plaintiff must in his replication aver assets more than sufficient to satisfy all, 1 *Roll. Abr.* 922, pl. 5. That the use of the defendant's fair pleading in this case is, that plaintiff may in fact take judgment of assets *in futuro*. That the covin is the matter in issue on replication *per fraudem*, *Turnor's case*(4), and [9 *Rep.* 108(5)], and Sir *William Jones*, 91, *where see the manner of such pleading *per fraudem*; he cites for the same 1 *Lutw.* 445, *Bell* and *Bolton*.

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Serjeant *Eyre*, in reply, cites 3 *Lev.* 57, *Lemun v. Fooke*, replication would be good if it averred assets *ultra* the money in the condition.

He cites *Carthew*, 208, *Page* and *Wats*, That the concluding the plea with a general *plene administravit* will wave the specialties pleaded before; therefore, in this case, if the words, "sums due and payable," relate not to the sums mentioned in the condition, the bond to Sir *William Morrice* is waved, since the penalty is not due till a breach of the condition, and there was no breach of that condition at the time of the plea.

Lord

(1) 3 *Lev.* 368.

(2) This reference fails.

(3) 3 *Dunv.* 392, p. 2, 3. S. C.(4) 8 *Rep.* 262.(5) *Co.* 132, in the former edition, for which, as this is too indefinite, the case between brackets is substituted.

Lord *Hardwicke*, C. J. This is a new point which my Brother *Eyre* has started; and, as to that of Sir *William Morrice* keeping it up *per fraudem*, how could the plaintiff prove that.

Marsh cites *Cro. Cha.* 490: That an executor may release a bond upon receipt of the sum in the condition, and it shall not be a *devastavit* in him (1).

Dennison cited further *Cro. Jac.* 8, 35, 382, and 3 *Lev.* 311, *Knighton* and *Moreton*.

And now this term, without any further argument, the opinion of the court was delivered by Lord *Hardwicke*, [C. J.] as follows:

Upon this special verdict two points have been made; first, Whether upon the pleadings in this record, and the matter found by the verdict, the penalties of the bonds whereof the days of payment are past, or only the sums mentioned in the conditions, ought in a court of common law to be considered as liens on the assets. Secondly, If in these respects there be any difference between those bonds whereof the days of payment are past, and the bond to Sir *William Morrice*, the days of two payments not being come at the time of the plea; and then another question will remain, what judgment must be given upon the matter as here found. As to the 1st point, nothing is more certain than that if there be a bond with a penalty, that when the day appointed for payment by the condition is past, that the penalty is the debt at law, and relief can be only had in a court of equity; and therefore the defendant might have pleaded so as to have had the full penalties allowed her as charged upon the assets; but she having in her plea set forth the real sums due, and having by special averment tied herself up to them, it has been insisted *on by plaintiff's counsel, that no more ought to be allowed her to cover assets than those less sums which she has shewn were payable by the conditions; but we are all of opinion, †that is, my brothers *Page*, *Probyn* and myself, that the penalties of bonds whereof the days of payment are past, ought to be considered as the debts due at law, so as to cover assets. The ancient method was only to plead the penalty, and to leave it to the plaintiff to shew, that the obligee was willing to accept the debt due in conscience, and that the penalty was only kept on foot *per fraudem*. And this was so constantly the method, that there is not any precedent, either in the ancient or modern books of entries of a plea of *plene administravit*, where the sums of the conditions of the bonds pleaded are set out:

† Mr. Justice *Lee* gave no opinion, he being a relation of the defendant.

(1) And see 4 & 5 *Anne*, c. 16; by which payment of principal, interest, and costs, at any time before action brought, may be pleaded in bar, or, after action brought, and bail put in, 6 *Mod.* 11, such sums may be paid into court, and the proceedings stayed.

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out: and, when this method was first departed from, I do not find; but I believe it was when the Judges begun to complain of the difficulties plaintiffs were put to by such a disclosing of only part of the case; the first instance whereof, is in the case of *Page and Denton*, 1 *Vent.* 354; where the court said, that if men would plead their case specially, it would save many a suit in Chancery; the other is in the case of *Parker and Atfeild*, 1 *Salk.* 312, where the court said that the best way for an administrator to plead, is to plead truly and honestly; and though there is a judgment for a penalty, he ought to plead the judgment, and shew how much is due; from which sayings it was inferred by the plaintiff's counsel in this case, that when the defendant shews what is due, no more assets shall be covered than to the amount of what is so shewn, or else, said they, what is the use of this new way of pleading? But as no authority can be found to prove that the penalty is not to be taken to be the debt, this *obiter* saying in the books shall not settle it; and yet, notwithstanding, this manner of pleading will remain to be of great use. Upon the old method nothing appears in the plea but the penalty, and the plaintiff is not, thereby, enabled to tell whether it be a single bond, or with a condition, and the defendant is not bound to make a *profert* of the bond pleaded, not being supposed to have the same in his custody, much less is the obligee in such bond bound to produce it; and if there were any collusion between the obligee and the executor who pleads such bond, the plaintiff might perhaps be never able to come at the truth of the fact in order to make a proper replication, which would oblige him to resort to a court of equity, to discover and make a proper case at law; whereas by setting out the condition in the plea, all these delays are avoided: for the plaintiff sees what is the real debt, and may, upon enquiry, know whether the penalty is kept on foot *per fraudem*; and this is sufficient to satisfy the saying of the court in the case of *Page and Denton*, that such pleading will save many suits in Chancery; for so it will, and will enable the plaintiff to have the equity of his case, even, in a court of common law. But to require more might be *perilous to an honest executor; for the penalty is to secure interest, costs, and charges to the obligee, as well as the sum mentioned in the condition. And the executor of the obligor is likewise entitled to this out of the assets, and therefore it is impossible to settle and adjust that at law, without confounding law and equity. And disputes may happen between the obligee and the executor, which may oblige the executor to apply to a court of equity, of which he must pay costs, as if he should apply to equity to oblige the obligee to take only his real debt. Or if he would take the benefit of the statute for amendment of the law (1), and pay the money really due into court, he cannot do that, till an action is brought against him, and then, too, he must pay costs; and,

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and, therefore, if the matter were to be taken thus strictly upon the plea, the executor might be left to pay such interest and costs out of his own pocket, though it would be no inconvenience to oblige the obligee, if he were plaintiff, to take his real debt; therefore it is better that it should be open to equity in such cases, than for us to blend the rules of law and equity together. This is the sense in which that general expression, which has been so much relied on for plaintiffs, should be taken. There were cited for plaintiffs *Cro. Cha.* 490, *Knyveston* and *Latham*: but the case is really an authority against him; for it was held that the penalty of the bond is the debt at law, and relief could be had only in a court of equity; and that was confirmed, as the book says, by the judges at the table in *Serjeants Inn*; though it was held by two judges, that a release by an executor of full age, having received the principal and interest which was due in equity, should be only assets for the interest and money received, and not be a *devastavit* for the residue; and it was for this latter opinion, only, that the case was cited. But there is a great deal of difference between charging an executor with a *devastavit* for not receiving a penalty which a court of equity would not suffer him to receive, and letting him have the advantage of a penalty to cover assets, as in this case. The case of *Page and Denton*, 1 Vent. 354, was likewise cited for the plaintiff; and, at first sight, it seemed a strong case for him; but upon considering it, it is otherwise; for it is a plea of a retainer by an executor himself, and not of payment to the third person; so that it would have been absurd to require a replication that the obligee was willing to accept a less sum, or that the executor kept the bond on foot *per fraudem*; and this was the true ground of that case. And the court took care to distinguish that case from the case of a forfeited bond standing out to a stranger, so that case is like the case of *Thompson and Hunt* (1); that case was a plea, by an executor, of judgments obtained against him upon several bonds made by the testator, and replication, that the obligations were with conditions to pay less sums; and that the defendant had assets to pay the plaintiff *ultra* what would satisfy the debts and judgments in his plea: and, on demurrer to the replication, it was held good, because the penalties are the legal and due debts, and the plaintiff might have aided himself by pleading that the bonds were kept on foot by fraud and covin, and upon issue of the fraud the plaintiff might give in evidence such matter as would serve him to avoid the penalties: and so, judgment was given for defendant; and that case of *Thompson and Hunt* is affirmed to be law in *Bell and Bolton*, 1 Lutw. 450. To distinguish that case from this it was said, that the several less sums were set out in the replication in that case; but that here they are shewn by the defendant herself in the plea,

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and that, therefore, it must be understood in this case, that she herself insists on more being due; but that makes no difference: for when in *Thompson and Hunt* the defendant averred in his rejoinder, that he had not *ultra* to satisfy the penalties, it was an admission of the replication, and the same as if the defendant had himself set out the less sums. Another difference was made from the different manner of pleading in this case, because the defendant, in pleading the several bonds, has added, that the sums in the conditions remain still due and unpaid; and then concludes her plea, that she has not assets *ultra* what will satisfy the several sums by the bonds, articles, and judgments due and payable, and therefore they would have it, that the sums said in the conclusion to be due and payable on the bonds, mean the sums before to be due thereon, viz. the less sums. But in answer to that, the words in the conclusion of the plea are not the same as in the several averments; in the averments the words are, "due," and in the conclusion the words are, "due and payable," which in law is the penalty. But there is a more substantial answer to be given to that; for the defendant has averred, that the penal sums of the articles remain due and unpaid, as well as the sums of the bonds; and as to the articles at least, the words must, of necessity, mean the penalties, and, it would make strange confusion in the same plea, to construe the same words to refer sometimes to penalties and sometimes to the less sums, sometimes to the debts at law and sometimes to the debts in equity; therefore, if those words are to be applied to the penalties in the articles, they ought, likewise, to be applied to the penalties of the bonds. It was likewise objected, that there is no precedent of a replication *per fraudem*, where the defendant's plea sets forth the particular sums due by the condition; but the answer that has been given to that is sufficient, that neither is there any precedent of such a plea.

As to the second point, we are of opinion that the defendant can be allowed no more upon Sir *William Morrice's* bond than is due in equity and conscience. For it appears that the days of payment of the two last instalments were not come; and we conceive, that upon this plea, all the prior instalments must be taken to be satisfied. Then the *question will be, if a bond be pleaded with a penalty, conditioned to pay a less sum at a day to come after the plea, whether it shall be allowed to cover assets to the amount of the penalty. It must be allowed that such a bond is pleadable; so is *Cro. Cha.* 363, and 1 *Roll. Abr.* 925. *pl.* 2; but then it will cover assets no further than the amount of the sum payable in conscience; for, the bond not being payable, nothing is due at the time of the plea, and it would be absurd to let the executor cover assets for a debt which cannot be recovered against him; and this is proved by the way of pleading in such cases; so in *Cro. Eliz.* 315, the defendant avers that he has no assets *ultra* the money due by the condition, and not *ultra* the penalty; so 3 *Lev.* 57, *Leman* and *Fooke*; judgment given for the defendant, because plaintiff in
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his replication did not say that the defendant had assets *ultra* what would pay the money in the condition; which, directly, admits that if the replication had averred assets in the defendant's hands *ultra* to pay the less sum, it would have been good. If we consider, too, how this differs from a forfeited bond in the reason of the thing, this bond the executor may pay, by paying the less sum when the day comes, for she has admitted assets in this case by pleading it; so is 1 *Salk.* 198, and 312; and, if she has assets, it is her duty to pay it; and if she does not, but lets the interest run upon it, having assets, that will be a *devastavit*; so is 1 *Vent.* 198, 2 *Lev.* 39. It differs also from a forfeited bond in this, that the plaintiff could not reply *per fraudem*; for it was no fraud in her not to pay a bond which was not due.

But the greatest difficulty is, what judgment must be given in this case, for, upon this verdict there are two objections: 1st, That the assets found liable to satisfy the plaintiff, are found in one entire sum, supposing all the penalties are not to be allowed as charges upon the assets, and no distinction is made in the verdict as to the penalties of the bonds, and the assets to be liable if some are allowed and others not; but as the court is now of opinion that some of the penalties ought to be allowed and not others, that will reduce those assets in defendant's hands which are really liable to the plaintiff's demand. The other objection is, that the interest included in the sums found to be really due upon the bonds is only carried on to the testator's death; and yet, it appears, that the executor must pay interest on Sir *William's* bond to the time of payment of the two last instalments: for which reasons the court cannot give judgment for the entire sum found by the jury; but then, the question is, whether we can sever the sum found by the jury, or whether the verdict can be amended, or whether there must be a *venire facias de novo* awarded.

*To which purpose the court set a further day in this term for hearing counsel upon the said points, and then *Strange*, for plaintiff, argued,

That the court may give judgment as the verdict now stands, and for that purpose may compute what allowance is to be made to the defendant, and so give judgment for the plaintiff for such sum as he appears to be lawfully entitled to upon this record; and he cited *Hob.* 54, *Foster* and *Jackson*, that howsoever the verdict may seem to stray, yet if a verdict may be concluded out of it to the point in issue, the court shall work it into form and make it serve. And, for the same purpose, he cited 1 *Sid.* 5, 27, and *Carter*, 80: that the court will set verdicts right, which give greater damages than are declared for; and cites a precedent of that sort in *Thompson's Entries*, fol. 458. He cited, also, the *King* and *Hayes*, *Hil.* 1 *Geo.* I. 2 *Stra.* 843. 2 *R. Raym.* 1518. *Barnard.* B. R. 31, [48,]. *Hayes* was indicted for three facts: 1st, For forging a bond; 2dly, For publishing such bond; 3dly, For publishing a bond generally, knowing it to be forged. A special verdict was given, that he forged a bond in the words and figures following; that

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that he published the same bond knowing it to be forged; and said nothing as to the third fact. And it was objected, that as the verdict neither found the defendant guilty, or not guilty, as to that, that no judgment could be given; but the court held, that upon the facts stated to them, they must adjudge the defendant guilty as to the two first, and not guilty as to the last, and that they were to do what the jury ought to have done. He likewise cited a precedent from *Townsend's first Book of Judgments*, 165; which he would have be the precedent for this.

Serjeant *Chapple*, for the defendant, argued, That no judgment can be given upon this verdict, for there will be no *quantum* of assets plainly appearing wherewith to charge the defendant; and he cited 2 *Roll. Abr.* 693: *Lit. s.* —: *Cro. Cha.* 549. *Crisp* and *Pratt*: *Bro. Exe.* 141: 1 *Roll. Rep.* 234.

Lord *Hardwicke*, C. J. The rules which have been laid down as to special verdicts must be allowed; on the one hand, that the facts found can only warrant the judgment; on the other, that the matter sufficiently appears upon the whole, the court may so mould and form it, as to give a proper judgment resulting from the whole taken together. And to this purpose the words in *Hob.* (1) are very right; the only question here then is, whether sufficient facts are found to give judgment upon; and as to the doubt which the jury make, the court is not strictly tied to that, nor by the conclusion they make, but are, if necessary, to distribute the facts found, and to give a proper judgment upon the whole taken together, \*even though it were to contradict the conclusion. 2 *Roll. Abr.* 706. *pl.* 33. which is cited and allowed to be law in *Hard.* 347 (2). And I am of opinion, that it does sufficiently appear upon this verdict what allowance ought to be made the defendant, and that without any intendment; for, as the jury have found the penalties and conditions, the rest is but matter of computation, and they have found the interest to be at the rate of £5 *per cent.* and the *terminus a quo* to be from the death of the testator. Which facts being found, all that remains is computation, which the court has always had power to make or alter; therefore, I think there is sufficient found for us to give judgment upon; but the question is, in what manner it should be entered; and as to that, I think, the precedents that have been shewn are stronger than the present case; for, if damages which are entire may be severed, *a fortiori* assets may. There is a precedent in *Townsend's second Book of Judgments*, *fol.* 151, which might be made agreeable to this case; and that book was printed by the authority of *Ld. Ch. J. Vaughan*, and is of better authority than *Thompson's Entries*. There are likewise in the same book, *p.* 117, a judgment in ejectment with a *remit-titur*;

(1) 54.

(2) This seems to be a mistake. The citation in *Hardres* is from *Dyer*, 362, a; viz. a special verdict finds that executors received rent, reserved to their

testator, his heirs and assigns; and so assets. Holden, that the so is void and the heir entitled to the rent. See 3 *Roll. Abr.* 701, 2.

itur; and p. 189, another of the same in *quare impedit*; therefore, I think, judgment ought to be specially entered for the plaintiff.

*Page and Probyn, accord'*: But as it was to be a special entry, a rule was, that the parties should attend a judge to settle the entry.

The entry of the judgment was thus: Whereupon all and singular the premises being seen and fully understood by the court here, in as much as it appears to the said court here, that the penal sums in the aforesaid two bonds to the said *Thomas Wilson* and *Duncan Campbell* ought in this case to be allowed as charges upon the assets of the said *Humphry Morrice*, and that the penal sum in the said bond to the said *Sir William Morrice* ought not in this case to be allowed as a charge upon the assets of the said *Humphry Morrice*, but that only the principal sum of £5000, payable on the said 24th day of *June*, in the said year of our Lord 1732; and the further sum of £1500, payable on the said 24th day of *June*, in the said year of our Lord 1732, to the said *William Morrice*, with all interest for the said two last mentioned sums from the said 24th day of *June*, in the said year of our Lord 1731, to the respective days of payment thereof, ought in this case to be allowed as charges upon the assets of the said *Humphry Morrice*; therefore by the assent of the said governor and company of the Bank of *England*, the sum of £4310 being deducted out of the said sum of £18,969 12s. 9d. by the jury aforesaid in form aforesaid found, whereby the assets in the \*hands of the said *Catharine Morrice* on the day of exhibiting the plaintiff's bill liable to the demands of the said plaintiffs, are only the sum of £14,659 12s. 9d. it is considered by the court, that the aforesaid governor and company do recover against the said *Catharine* their said damages to £28,993 8s. 1d. and also the said 40s. by the jury aforesaid in form aforesaid assessed, and likewise £198 7s. 7d. to the said governor and company at their request for their costs and charges aforesaid by the court here of increase adjudged, which said damages amount in the whole to the sum of £29,193 15s. 8d. to be levied of the goods and chattels of the said *Humphry Morrice*, deceased, at the time of his death in the hands of the said *Catharine* to be administered, if she hath so much in her hands, and if she hath not so much in her hands, then £200 7s. 7d. parcel of the damages aforesaid, to be levied of the proper goods and chattels of the said *Catharine*, and that the said *Catharine* be in the mercy of the court; and that the said governor and company be also in the mercy of the court for their false clamour against the said *Catharine* for the residue of the aforesaid premises, whereof the said *Catharine* is by the jury aforesaid in manner aforesaid acquitted, and that the said *Catharine* go therefore without day, and so forth.

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## EASTER TERM,

9 Geo. II. 1736. B. R.

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PHILIP Lord HARDWICKE, Lord Chief Justice.

Sir FRANCIS PAGE, Knt.

Sir EDMUND PROBYN, Knt.

WILLIAM LEE, Esq.

JOHN WILLES, Esq. Attorney-general.

DUDLEY RYDER, Esq. Solicitor-general.

} Justices.

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ANON.

Rule to set aside  
an award before  
it be made a rule  
of court, refused,  
on the ground  
that until then, it  
is not before the  
court.

*STRANGE* moves to set aside an award as a bad one, before it  
be made a rule of court. But

It was refused, because till it be made a rule of court, it is not  
before the court.

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KIDWELL'S CASE.

An attorney  
may, at his own  
request, be struck  
off the roll.

*HOPKINS* moved, that *Kidwell* might, at his own instance  
be struck out of the roll of attorneys, which was granted (1).

(1) See 1 *Tid.* 82. edit. 1812.

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BUSH, Assignee of JONES, *versus* GOWER.

2 Stra. 1043, [but not so full].

THE defendant *Gower* having given bond and judgment to *Jones, Jones* afterwards became bankrupt, and thereupon his assignee sues out a *sci. fa.* upon the judgment against the defendant; which judgment was of *Michaelmas* term, 1732. Defendant pleads in bar, that upon the 22d of *December*, 1732, a corrupt agreement was made between the said *Jones* and the defendant for the loan of £200 for six months, he being to pay £20 at the end of six months, and to give his bond for security, and further to seal a warrant of attorney, whereby it should be put into the power of the said *Jones* to cause the said judgment to be entered upon record, and to give a release of errors. That in pursuance of the said agreement the £200 was lent, and the defendant on said 22d of *December*, 1732, entered into a bond, and made such warrant of attorney and release of errors. That the said £20 to be paid for interest for six months is against the statute; that the said judgment was entered as of *Michaelmas* term, 1732, and is void because of such corrupt agreement.

Serjeant *Chapple*, for plaintiff. This plea is insufficient; it is an absurd plea in averring the judgment to be void in pursuance of a corrupt agreement.

But judgment is not void, for none of the statutes of usury ever extended to judgments; the statutes are, 13 *Eliz. c. 8. s. 3.* 21 *Jac. I. c. 17.* 12 *Car. II. c. 13.* and 12 *Ann. st. 2. c. 16.* The words of the statutes are, that all bonds, contracts and assurances for payment of money lent upon usury shall be void; none of which words can import any thing more than to make the acts of the party void, and not to make judgments void, which are the acts of the court. Judgments are not assurances, but proceedings upon assurances. If the usury would vitiate a judgment, it would never be pleaded pending the action, but after judgment obtained, it would be pleaded to a *sci. fa.* or shewn in *audita querela*. That nothing can be pleaded to a *sci. fa.* but matters which come subsequent to the judgment, 1 *Salk. 2. West and Sutton*, and which he could not have pleaded before; and so is *Cro. Eliz. 283, Allens and Andrews*, and that what is in annulling of the record is not sufferable. He cited also *Cro. Eliz. 588, Middleton v. Hill*, where the same plea as in the case at bar was attempted to be maintained to a *sci. fa.* upon judgment confessed, as this is; but the court held, that the judgment could not be termed an assurance, nor avoided upon such \*a surmise; for the defendant might have pleaded it to the action, and not have suffered judgment. And though it may be a practice to avoid the statute, that shall be rather tolerated than to avoid judgments upon such suggestion. The

same

Matter that might have been pleaded in the original action cannot be pleaded to a *sci. fa.* upon the judgment.

The word "contract" in the statutes against usury, extends to all personal things.

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same point was also held in 1 *Sid.* 182, *Rowe and Bellaseys*. He cited also *Cro. Jac.* 579, that the bare surmise is not sufficient to avoid a judgment.

Serjeant *Hawkins*, for defendant. As to the absurdity of the plea, he answers, that the plea has by the demurrer confessed, that judgment was entered pursuant to the warrant, and entered up corruptly. That the word "assurance" in the statute is as large a word as can be, and as a fine levied, or recovery suffered is the assurance, and not the deed to lead the uses; so the judgment entered in pursuance of the warrant, and not the warrant is the assurance. He admits the judgment is not *ipso facto* void, nor absolute, but is so as to this purpose. That the reason why such plea was refused in the case cited for plaintiff, was, because it might have been pleaded before the judgment, but in this case there was no opportunity for the defendant to plead it, and, therefore, as we might not have had advantage by pleading it before, we ought to have it now. That the reason upon which the case of *Middleton and Hill* is founded is, because a judgment shall not be avoided upon a surmise; but by 3 *Co.* 72, *Farmer's* case, an averment of covin, &c. may be to avoid a fine. *Jenkins's Century*, fol. 253, 254, usury, fraud or covin, may be averred against a fine, 1 *Roll. Abr.* 310, A man shall have an *audita querela* against execution taken out upon a statute usuriously acknowledged: *Cro. Jac.* 25. S. P. and no objection that a surmise could not be made. 5 *Co.* 69. b. *Burton's* case, that if there be usury, the party shall not be concluded from averment against a deed. And if he be not concluded against a deed, why should he against a record. 2 *Vent.* 48; fines are often set aside for undue practice in the passing of them. 3 *Lev.* 36; a fine vacated for infancy in the wife. Sir *Thomas Jones*, 103; error on a judgment in an inferior court upon a bond to pay money at a place out of jurisdiction, and agreed that the plaintiff in error was estopped to take advantage of that, because there was a surmise in the record below, that the place was within the jurisdiction, which the defendant below *non deducit*; and the court being informed that the surmise never was made in the inferior court, but contrived after the writ of error brought, they ordered the same to be erased out of the record, and then reversed the judgment. 1 *Sid.* 222; a judgment vacated being entered a term precedent to the writ. That the court would not have suffered this judgment to be entered up if the usury had been shewn to them, and for the same reason they should reverse it now it appears.

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\*Serjeant *Chayple*, in reply. That if the argument is good of his not having had opportunity to plead be good, it should at least appear very plain to be a case where no opportunity was; whereas this warrant is only set out to be a deed to give *Jones* a power to enter up the judgment: now that might only be an agreement to appear voluntarily without an arrest; for it does not say, it was a warrant to empower him to confess a judgment; he cites also *Cro. Eliz.*

*Eliz.* 25, and *Keilway* 25, that an *audita querela* doth not lie after judgment upon a thing he might have pleaded before.

Lord *Hardwicke*, C. J. This is a matter of great consequence, for it opens a door to an evasion of the statute of usury, and, therefore, as far as the court can, we will come at it. But the question now before us is, whether, in this method, the court can give leave to prove the usurious contract in avoidance of the judgment; now the general rule is, that judgments are not to be avoided by surmise of a matter of fact, especially a fact that existed before the pronouncing of the judgment, and it can never be done at all, but where such surmise is particularly given by act of parliament, and then it may: the question then is, whether by the words or construction of this statute of 12 *Ann.* the party can have advantage by pleading this matter of fact. The words are, all bonds, contracts and assurances shall be void, so that every thing which can come within the description of those words shall be void. But I am not satisfied that a judgment, though by default, or by agreement of the parties, is within the words "contract or assurances;" and I believe no case can be cited where a judgment has been called an assurance. Fines and common recoveries are of a different nature; for a fine is nothing but an agreement of the parties recorded, and a common recovery is a common assurance, and has been settled to be so long ago; and I have no doubt but that a fine and recovery may be avoided for a fraud. But the term "common assurance" was never applied to any other judgments but fines and common recoveries, and was [never] extended to judgments given in actions of debt, &c. It seems strange, that no words have been, ever, inserted in any of the statutes against usury, to meet with the practice; for it has been used when in Q. *Elizabeth's* time, as appears by the case in *Cro. Eliz.* but, possibly, the reason might be, lest they might extend to all judgments; for where would you stop, the pleading in this case is only a warrant to empower the plaintiff to enter up judgment. And what is that more than the case put by my brother *Chapple*, of action brought and a power to an attorney to appear voluntarily; the defendant, if he would, might have revoked this power; and if he had, and plaintiff had applied to the court, I should, upon disclosure of this matter, have been of opinion to let the revocation stand. If the act had said, \*all judgments by default upon usurious contracts shall be void, what work would that have made? Why, to draw into examination all judgments by default, which would always be used as a means of delay. The stat. of *Mortmain*, 7 *E. I.* has as strong words as possible, against corporations taking in *mortmain*, not to take by colour of gift, &c. *vel alio quovis modo, arte vel ingenio*, and it was held, thereupon, that they could take by no manner of conveyance; but they, to evade the statute, used to bring a *præcipe*, and so, upon the tenant's default, recovered the land by the judgment; and that was held not to be within the statute: so that it was necessary to make the stat. of 13 *E. I. c. 32*, which gives an inquest to inquire in such case,

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case, whether the demandant had a right in the thing demanded or no, and if found not to have, then to forfeit, &c. which shews that judges do not admit any surmise against a judgment, and I see no reason for us to go contrary. As to the cases cited of statutes staple, they are quite of a different nature; for the records there, are but pocket records, and they, too, are no more than bonds upon record; so, as to setting aside fines for fraud: to be sure the court can do it, but then that is not done by pleading and avoiding them upon record, but by the discretion of the courts upon an interlocutory motion. But, however, it furnishes another consideration, viz. Whether judgments of this sort might not be set aside in such an interlocutory way, as whether the party might not come to the court, and by motion pray to set aside the judgment for ill practice; for the warrant of attorney may be considered as a contract within the act of parliament, and upon that foot may be set aside. So, where an infant lets judgment go by default, if he appeared by attorney to whom he had made a sealed deed, though he could not set it aside by writ of error, or by *audita querela*, or upon pleading to a *scire facias*, yet he might come to the court and move to set it aside, as was the case of *Jackson and Mosey, Trin. 3 Geo. I. in C. B.* where a warrant of attorney to enter up judgment was made by an infant for security of a past debt, and judgment entered up thereupon, and the court, upon motion, set aside the judgment. But, I am afraid, that in this method we are not warranted by the statute, or by the rules of law to do it, and therefore I am of opinion that judgment be given for plaintiff (1).

*Probyn, J.* The defendant in this case has given up a right of insisting upon the usurious contract, which he might have pleaded.

*Lee, J.* This case depends entirely upon the construction of the statute against usury. There have been instances in this court, of bonds which were fair bonds at first, and at the day of payment an usurious contract made for forbearance, and those bonds held to be good; but that the plaintiff should forfeit treble value in a suit upon the \*latter clause of the statute: and so are the cases of 1 *Saunders*, 294, and *T. Raym.* 196. And some method of that sort might be thought of in cases of this nature: but we must go upon the general construction of the statutes of usury. There is an act of parliament, the act against gaming, which *particularly provides*, that judgments shall be void. The plea in this case is something odd; but, taken to be a plea of a warrant of attorney to enter judgment, the question is, whether such a judgment is an assurance? for, otherwise, the statute does not make it void, whatever other proceeding it may have instituted: now, the judgment of the court has never been taken to be an assurance, but the contrary, as appears

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(1) But see 2 *Corp.* 727, where, upon a rule nisi to vacate a judgment confessed, and to stay the proceedings on the *scire facias*, upon an allegation that the consideration upon which the warrant of attorney had been obtained, was usurious, the court directed an issue to try the usury, and enlarged the rule in the mean time.

pears by the cases cited; so that if the words of the statute do not take in this case, to be sure the plea is not good.

Lord *Hardwicke*, C. J. I take the word "assurance" in the act to mean assurance of lands, as is the proper legal signification of it; for the word "contract" extends to all personal things. *Per tot' cur.* Judgment for plaintiff (1).

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BUSH, Assignee  
of JONES,  
versus  
GOWER.

(1) This case is cited for the first point, 2 *Tid.* 1088.

### The KING *versus* ADAMS.

3 *Hawk. P. C.* 229, n. S. C.

**HAYWARD** moves that the defendant and his bail may be called upon their recognizance, but has given no notice; therefore

*Per Cur' Nil capit*, For as you call him not at the day upon which he is bound to appear, but at a particular day, you must give him notice (2).

Previously to  
calling a defend-  
ant and his bail  
upon their recog-  
nizance, notice is  
necessary.

(2) And if the defendant do not appear upon that day the court will not discharge the recognizance, although the Attorney-General consent to it; but they will respite it till the next term. 11 *Mod.* 200.

### COXE and PHILLIPS.

**THE** defendant *Phillips* was formerly married to one Mr. *Muilman*, a merchant in *London*; but she being found to have a former husband alive at that time, that marriage with *Muilman* was afterwards declared to be null by sentence of the spiritual court, and *Muilman* has since married another wife; but now she, the defendant, has instituted a suit in the ecclesiastical court to repeal that sentence of nullity, pretending the man to whom she was married, at the time of marrying *Muilman* had, himself, at that time another wife alive; and therefore her marriage with him was void; and consequently the marriage to *Muilman* was valid: and this suit is now depending before the delegates.

In an action, not  
to determine a  
right or contro-  
versy, but to de-  
ceive the court  
and to raise a pre-  
judice against a  
third person, is  
unlawful, and  
punishable as a  
contempt.

\*The present plaintiff brought an action against the defendant upon a promissory note signed by her, to which she pleaded that she was married to *Muilman*; plaintiff replied that the marriage to *Muilman* was void, because of the prior marriage, and she rejoined that it was good, because the prior marriage was void, and so they were at issue, and the cause stood for trial; when *Muilman* applied to the court, and represented this to be a fictitious action by connivance

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nivance between plaintiff and defendant, to burthen him with actions and to impose upon the court; and

*Strange*, who moved for *Muilman*, cited a case of *Cutler and Goodwin, Michaelmas, 8 Geo. I.* see *Str.* 420, which was a writ of error in this court upon a judgment in the Common Pleas; and the very morning when it stood for a second argument, the parties told the attornies they had agreed; but the attornies wanting to know the court's opinion of the case, let the argument go on; and judgment was given; but the court afterwards set aside the judgment, for that very reason because the parties had agreed. The stat. of *Westminster 1, c. 29*, was likewise cited; which provides, that if any serjeant, pleader, or other, do any manner of deceit or collusion in the King's court, or consent unto it in deceit of the court, or to beguile the court or the party, they shall be imprisoned for a year and a day, &c. And cited 2 *Inst.* 215; where Lord *Coke* in his exposition of this statute of a fictitious suit which was within this statute; and *Comberb.* 445, where *Holt* says, If he had not thought the feigned issue had been directed out of Chancery, he would not have tried it, and says he, "do you bring fob actions to learn the opinion of the court?"

On the other it was said, That as to the case in *Comberbach, 425*, of *Brewster and Kitchen*, it appears to have had another argument, and judgment given at *p.* 466, notwithstanding what was said by *Holt*; and that *Corbet's* case in *Coke's Reports* was but a fictitious action.

Lord *Hardwicke, C. J.* Here are two questions; 1st, Whether Mr. *Muilman* is a proper person to make this complaint, and I think that as this is a contempt of the court, and may be of prejudice to Mr. *Muilman*, he may; for the court does not always expect that complaint of a contempt should be made to them by a party, for where there is a collusion between all the parties, a stranger may lay it before the court as *amicus curiæ*; and, besides, in this case Mr. *Muilman* is particularly concerned to do it; for though the verdict, if it had passed against him, could not have been given in evidence against him, not being party to the suit, yet it is a prejudice to a man to have the report of a verdict that he is married in this way. \*The second question is, Whether here be sufficient grounds of complaint. Now, this is a mere fictitious action, not to determine a right or controversy, but to deceive the court, and raise an evil fame of *Muilman*; and surely that cannot be said to be no offence. That such practices are not lawful, is plain from that old statute of *Edw. I.* and I cannot see how there can be a stronger instance than the present; and it is incumbent on courts of justice to keep the streams of justice clear, or they will be made use of as means of scandal.

As to the instances of *Corbet's* case, and that of *Brewster and Kitchen*; as to the † latter the court did express great resentment: but

† And so they did as to *Corbet's* case, but they did not know of it till too late. *Comberbach, 425.*

but in those cases it does not appear any complaint of contempt was made, and the court do not use to take up such matters *ex officio*. As to the causes by consent in Chancery, they are to determine real controversies and between adversaries as to the right, though amicable in applying for decision.

Upon the whole matter, the court thought this a contempt, even though the action were upon a real demand; because it had been made an ill use of; and therefore ordered, that the plaintiff and defendant and one *Hudson*, who was the acting attorney for both, should stand committed, to answer upon interrogatories; and that the proceedings in the action be stayed, and for the honour of the court vacated; but that was suspended till the examination over.

*N. B.* In about five days afterwards they were brought up and bailed, to answer interrogatories, but were obliged to give notice of the bail.

All this was in *Michaelmas* term last, and now this term, the master of the crown-office made a special report of the examination; and the court unanimously agreed that they had not cleared themselves of the contempt, and that this was a fictitious action: and, again, affirmed, that the reality of the debt does not make a material difference, if the action is brought in deceit of the court; for then the debt, though due, will be taken to be but a pretence, and the abuse of the court the same.

One of the interrogatories proposed to the attorney was, what authority he had to make use of the attorney's name he had used. To which interrogatory he demurred, answering, because it might subject him to the penalty of the late act. And the court allowed that a man may demur to an improper interrogatory: but *Strange* said, That in such case the method is to move to have that interrogatory suppressed. And *Matthews*, of the crown-office, tells me, that \*is the method and practice when the court is sitting; but this examination was in the vacation.

The court ordered, they should all stand committed (1).

(1) Cited by *Buller*, J. 3 T. R. 697. without the consent of the court, is See 16 *East*. R. where this case is also also a contempt, and after such trial cited by Lord *Ellenborough*, C. J. 150, they will stay its proceedings. See 157. See also 4 T. R. 402, where it was *post*, 241, as to the same defendants, decided, that trying a feigned issue, but not as to the same point.

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and  
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### MATTHEWS and LUCAS.

**YORKE** moves to set aside a judgment for irregularity, because the defendant was not served with the copy of the process; but it appeared he had been served with a copy of the declaration; and therefore

After notice of the declaration, it is too late to take advantage of an irregularity in the service of the process.

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MATTHEWS  
and  
LUCAS.

*Per Cur'*, You are too late, for you should have come in and taken advantage of it (1).

(1) See *Lofft*. 323, 333. 1 *Bos. & Pul.* 342, 344. 2 *Smith. R.* 391. 1 *Tamnt.* 59. 2 *Tamnt.* 243. But if the party entitled to take advantage of the irregularity give notice, that in case of any further proceeding the court will be moved, and such further proceeding be had, he will not be precluded from availing himself of the irregularity. 5 *Tamnt.* 330.

### The KING *versus* SYMONDS.

If upon an application by a mayor for a criminal information against a person for striking him while in the execution of his office, it appears that the mayor struck first, it will be refused.

IN an information for an assault, upon shewing cause, the question was, whether the defendant could justify his striking the mayor of the corporation of *Yarmouth* whilst in the execution of his office, the mayor having first struck him. And

*Per Cur'*, He may justify it, for though a magistrate is protected by the law whilst in the execution of his office, yet in this instance he has forfeited that protection by beginning a breach of the peace himself. And Lord *Hardwicke* said, that if the question be only, who struck first, in an information for a battery, the court will not refuse it, but will send it to be tried. Denied the information.

### DOLLIFFE *and* LANGLEY.

Proceedings in an action of debt on bond will not be stayed, although it was agreed that the bond should not be made use of till upon the happening of certain contingencies.

*MARSII* moves to stay proceedings in an action of debt, because it was agreed that the bond should not be made use of till upon certain contingencies.

Lord *Hardwicke*, C. J. If warrants of attorney to confess judgment were given with such agreements we do indeed stop proceedings, if contrary to the agreement, and so of bail bonds, because they depend on the course of the court; but in this case we can do nothing.

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### \*WOODCOCKE *and* BROOKE.

Claim of consu-  
nance allowed  
in behalf of the  
university of Ox-  
ford; and such  
claim should be  
made *primo die*.

DEFENDANT arrested in an action on the case by process out of this court; and in behalf of the university of *Oxford*,

Serjeant *Chapple*, moved last term, that consu-  
nance might be al-  
lowed to the university.

Lord

Lord *Hardwicke*, C. J. When was the action brought, for you ought to come *primo die*?

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And, satisfaction being given in that, an entry of a warrant of attorney from the Earl of *Arran*, Chancellor of the university, to claim consuance was read; then an entry of the *latitat* sued out of this court; then the letters patent to the university; then an exemplification of the act of parliament which confirms those letters patent; then a record of the like consuance allowed them in this court, *Pasc.* 1710. *Rotalo*, 330. Then affidavit that the defendant is a barber in *Oxford*, and was matriculated in the university, and dwells in the university; and another affidavit, that he is a servant of New College, with a stipend: and the warrant of attorney was likewise read; and thereupon the court made a rule to shew cause.

And now this term no cause being shewn, the rule was made absolute (1).

(1) See 15 *East. R.* 634; and also 12 see *Pr. Dict.* tit. "Consuance or Cog-  
*East. R.* 12, 19. And for a general consuance."  
view of the cases, practice, and forms,

### The KING *versus* PHILLIPS and Others.

THIS *Phillips* is the same defendant as above, *p.* 237, and Mr. *Muilman* who is mentioned in that case, a term or two ago, applied to the court upon several affidavits for an information against the defendant for subornation of perjury, in the cause in the ecclesiastical court; but now upon shewing cause, his counsel do not insist upon charging that offence, because it does not appear that any perjury has been committed; but hope there is sufficient ground for an information for an attempt to suborn the witnesses, or for a conspiracy to extort money from Mr. *Muilman*. And

Generally, the court will not grant an information where there is a civil suit depending relative to the same matter. [See *ante*, 240, as to the same defendants, but not as to the same point.]

*Strange*, who is counsel for the prosecutor, cited the case of *Lady Lawley*, 2 *Stra.* 904. *Barnard. B. R.* 263, [274, 287, 293, 459, *S. C.*] *Fitzgib.* 122, *pl.* 7, 263, *pl.* 8, [*S. C.*] who was punished and fined for an attempt to keep some witnesses in a prosecution out of the way, though in fact the witnesses would not keep away, but did give their evidence at the trial.

\*For the defendant it was said, among other things, that this application was improper, because it might influence the cause now depending before the delegates; and

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*Wynne* cited the case of *The King and Rhodes*, 13 *Geo. II. Stra.* 703 (2), where pending a suit before the delegates in litigation

(2) Cited 1 *Will.* 75. 11 *St. Tr.* 213, 219, 233.

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The King  
versus  
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Others.

tion of a will, an indictment was preferred against the executors for forging the will: and the court thought it was not proper to try the indictment till the cause before the delegates was determined: and afterwards the will was established as a good will.

Lord *Hardwicke*, C. J. As to the subornation of perjury, it has been rightly given up, no perjury appearing; as to the attempt to suborn, to be sure there may be an information for that; and here though there are contradictory affidavits, but in this case I am of opinion not to do it, because of the civil suit which is now depending. But yet I do not lay it down as a rule, that the court will not grant an information for perjury pending a civil suit, for if the perjury appears very plain to the court, they may, but only where there is such a contradiction of the charge as to make it doubtful, as in this case. As to the conspiracy, that may be an offence, though the cause before the delegates should be a just cause, it being made use of in order to extort money; but in this case the conspiracy, if not plainly denied, is at least doubtful, and was not the point of the application, but only resorted to now, but even this part of the case is very uncertain; though I think this rule ought to be discharged, yet I do it upon this single reason, because there is a civil suit now depending, and not because I think the parties innocent, and do therefore think that Mr. *Muilman*, upon a final end of the suit before the delegates, or a desertion of the cause, may be at liberty to make another application.

All the court agreed with him, and upon that single ground the rule was discharged (1).

(1) See 2 T. R. 196, where it was ruled that a party applying for an information must waive his right of action; but if the court, on hearing the whole matter, are of opinion that it is a proper subject for an action, they may give the party leave to bring it.

### MORGAN and LUCKUP.

2 Stra. 1044, S. C.

Taking a declaration out of the office, is a waiver of irregularity on the ground of no notice being subscribed to the copy of the process served.

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ON an application to set aside the proceedings for irregularity, no notice being subscribed to the copy of the process served:

*Draper* shews cause, that the defendant's attorney, viz. one who has been generally concerned for him, has taken the declaration out of the office, and paid for it, and the plaintiff has received the money, which he says is a waiver of the irregularity, as in the case of *Burken and Carter*, Trin. 3 Geo. II. where the irregularity complained of was, that defendant was in *London* charged with a bill of *Middlesex*, and on shewing that defendant had taken a declaration

claration out of the office and paid for it, the irregularity was held to be discharged.

Lord *Hardwicke*, C. J. I do not remember the case which *Draper* cites, but it seems very reasonable; for it is like what the court do when no common bail has been filed for the defendant, they will make the action good notwithstanding, if the defendant has taken a declaration from the office, and paid for it: and, therefore, I think the plaintiff now is not irregular.

*Probyn*, J. The defendant has notice by service of the process, and should have complained then of the irregularity; but now this is a waiver of the mistake made in serving the process.

*Per Cur'*, Rule discharged (1).

(1) *Wright* and another v. *Willes*, M. 416. 1 H. Bl. 222, 3. S. P. See *ante*, 21 Geo. III. K. B. 1 Tid. 162. Bar. 240, et n.

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### HUGHES and PIGOT.

*BOOTLE*, in an *assumpsit* against an executor, moves for leave to plead four pleas, viz. That the testator made no such promise, that the cause of action did not arise within six years, that the executor made no promise, and that he has fully administered.

Motion that an executor be at liberty to plead double, granted.

*Cur'*: Take your rule to plead as you think fit (2).

(2) See *ante*, 126, 7, et n. (1), 127.

### BOISSIER versus The LONDON ASSURANCE COMPANY.

*MATTHEWS*, in an action of debt upon the policy of insurance, moves, that defendant may have *oyer* of two policies of insurance, whereupon the plaintiff declares.

*Draper* for plaintiff, that he offers them *oyer* of one policy, which is all his cause of action, for though there are two policies in the declaration, one of them is only laid over again in another manner.

Where the same policy of insurance is repeated in a second count, rule for *oyer* of two policies denied.

Lord *Hardwicke*, C. J. Surely you are very fond of special pleading, since the act allows you to plead *Nil debet*, in actions on your policies. \*But this is no more than two counts for the same debt.

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## HALL and HOWES.

2 Stra. 1039. S. C.

A defendant arrested and in custody, but superseded for want of being charged in execution, cannot be held to bail in an action of debt upon the judgment.

THE defendant put in special bail, and then plaintiff recovered judgment against him, and his bail surrendered him; but afterwards, for want of plaintiff's charging him in execution within two terms, he was discharged upon filing common bail; and then plaintiff brought an action of debt upon the judgment, and held the defendant to special bail; now moved that defendant may be discharged upon common bail, upon the authority of *Clever and Jordan*, cited *Andr. 15, Hil. 8 Geo. II.* which was just this case; defendant surrendered in discharge of his bail, and after two terms discharged for want of plaintiff's charging him in execution, and an action being brought on the judgment, was discharged upon common bail. The case of *Chambers and Robinson, Michaelmas, 1 Geo. II. 2 Stra. 782. Barnard. B. R. 22*, was also cited; where, in an action of debt on judgment special bail was put in, and judgment for plaintiff, and a second action upon that judgment being brought, the court would not then hold the defendant to special bail.

On the other side was cited *Burdus and Hosier, Hil. 7 Geo. II. 2 Barnard. B. R. 369, 405*, where a judgment of £2000 being recovered, and defendant discharged in two terms for want of plaintiff's charging in execution in an action upon that judgment, court obliged defendant to put in special bail. But, now at the shewing cause, it appeared by the affidavits which were made in the cause last cited, that the reason why defendant obtained a *supersedeas* from execution, was, not any laches in the plaintiff, but by reason of some treaties between the parties in hopes of making matters up.

Lord Hardwicke, C. J. The question in *Chambers and Robinson*, was, only, how far the plaintiff was entitled to bail in an action of debt upon judgment; and the court held that if the cause of action upon which judgment was obtained was bailable, that the plaintiff would be entitled to special bail in an action of debt upon that judgment; but if he went on with actions upon the second judgment, he should not, for that would be vexatious and to accumulate costs. And they held, likewise, that if the original cause was not bailable, but the addition of costs, only, made the judgment amount to a bailable sum, that no special bail should be required in an action upon the judgment; but in this case the cause of action was bailable, but it depends on a collateral circumstance, viz. the not being charged in execution. Now in the case of *Burdus and Hosier*, the great ingredient \*of the court's requiring special bail was, the agreement depending between the parties, which prevented

prevented plaintiff's charging defendant in execution; and the case of *Clewer* and *Jordan* is directly in point, where the court discharged the defendant on common bail: and, that is, to be sure, the reasonable way, and will prevent vexation. Indeed, we do not suffer little circumstances of treaties between the parties to alter the course of the court; unless it be a particular and express agreement not to take advantage of laches. And I think a rule should be made to make this matter certain. A rule should be made that in no case, where defendant is discharged for want of being charged in execution, that plaintiff should be entitled to special bail in an action upon the judgment.

*Per Cur'*, Defendant discharged on common bail (1).

(1) 2 *Str.* 782, 943. 2 *Wils.* 93. *Cowp.* 72, *Cookson v. Foster*, T. 23 Geo. III. K. B. S. P. 1 *Bos. & Pul.* 361; but see *Bar.* 62. These cases all presume laches in the plaintiff. But if the defendant were arrested in the original action, he cannot be held to bail on the judgment, whether after verdict or by default. 2 *Str.* 1218. *Say. R.* 43. *Pr. R.* 54. *Cooke's R.* 32. *S. C. Bar.* 116. But if the defendant were not arrested in the original action he may. 8 T. R. 85. *Pr. R.* 55, 56. *Cooke's R.* 32. *S. C. Bar.* 116. 1 *New R. C. P.* 133. And further as to two arrests for the same, or in reference to the same cause of action, see 1 *Tid.* 209, edit. 1812, p. 300; also *Rules and Orders*, K. B. by *Bourne*, 1795. The present report is alluded to, n. (b), 7 *East. R.* 332.

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### The KING *versus* HOLLISTER.

**FILMER** moves for the common rule to inspect the charter and corporation books. There is a rule made to shew cause, why an information *quo warranto* should not go against the defendant.

In *quo warranto* a rule will be granted to inspect charter and books.

Lord *Hardwicke*, C. J. I think we have done it of late upon a rule to shew cause. Take it (2).

(2) 2 *Str.* 1223. *Say. R.* 145, *acc.* But see 1 *Bl. R.* 37. *id.* 351, *contra.* Also see 3 T. R. 581. In merely civil cases, and with relation to court rolls, &c. the motion seems to be of course, but granted on a proper affidavit, stating application for leave to inspect, and refusal. *Bar.* 236. 1 *Wils.* 398; also that inspection is necessary. 1 *Ld. Raym.* 252. *Carth.* 421. And persons empowered by the stat. 3 Geo. III. c. 15, to inspect the entries of freemen, have a right to inspect ALL books, papers, &c. in which the admission of freemen are entered. And where there are two or more bailiffs, &c. of a borough or corporation, a joint action will lie if they refuse inspection, though the words of the statute are in the singular number, mayor, bailiff, &c. 1 *Cowp.* 192. So also in an action brought by the corporation for toll against the defendant, the court, on his application, granted a rule for inspection of such parts of the deeds, &c. as related to that matter on the town clerk, which he was to give on oath. 3 T. R. 303. See also *Peak.* 99. 4th edit.

ROGERS



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## ROGERS and BIRKMIRE.

2 Stra. 1040. S. C.

A joint distress for two distinct messuages, at two distinct rents, cannot be justified.

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**I**N trespass for entering his house and taking his goods, defendant justifies and shews, that being possessed of the said messuage and likewise of a stable under a term of years, he demised the said stable, 23d of December, 1726, to *D. Lock* for 21 years, who entered and was possessed; after which, he demised the said messuage to the plaintiff for        years, reserving a rent, who, by virtue thereof, entered, the said *Lock* being then possessed of said stable. And it was by the said indenture covenanted between the said plaintiff and defendant, that if the defendant could procure the said *Lock* to surrender his said term before *Christmas*, 1733, then *Rogers* should possess and enjoy the said stable from the time of such surrender for        years at        rent. And he avers that *Lock* did, on the 20th September, 1733, surrender his lease to the defendant, and that, thereupon, the plaintiff entered upon said premises, and held the same till the time of the trespass: and that the sum of        , being part of the rent of said messuage, being in arrear, and the sum of        , part of the \*rent of said stable being, also, in arrear, the defendant entered and distrained for the same, &c. which is the same trespass, &c.

To which plea plaintiff demurs.

For plaintiff it was argued, that the rent of the messuage and stable, from the manner of the reservation thereof was not one entire rent but several rents; and, therefore, defendant should have shewn, that all the rent distrained for, was distrained upon the premises out of which it issued, viz. That for the messuage, upon the messuage, and for the stable, upon the stable: whereas, here it appears to have been a distress for the whole, as well for the stable as for the messuage, upon the messuage only, which was not liable for the rent of the stable, and therefore the justification is bad, and that these are several rents; the authorities were cited of *Cro. Eliz.* 340. 2 *Roll. Abr.* 448, *G. pl.* 1. *Dyer*, 308, 309. 1 *Anderson*, 174. 3 *Leon.* 124. 5 *Co.* 55. *Sir W. Jones*, 207. *Cro. Cha.* 154, and *Clark and Lucas, Michaelmas*, 2 *Geo. II.* where a joint distress for three several amerciaments in an inferior court for three defaults of appearing to three plaints was held a bad distress; and *Stephens and Haughton*, 2 *Stra.* 847. *Barnard. B. R.* 128, 214. *Fitzgib.* 46, *pl.* 9. 108, *pl.* 9. *Hil.* 2 *Geo. II.* [S. C.] a joint distress for three several amerciaments for three offences in selling bread under weight, held a bad distress; and the reason given was, because though the party should submit to pay one of the amerciaments, yet he could not have part of the distress returned, it being joint.

For

For the defendant was cited 1 *Bulst.* 101, where a joint distress of a colt and cow *nomine heriotorum* for two parcels of land was held a good distress; and said, that though this might be bad in an avowry, yet in trespass the defendant is bound only to excuse the trespass, and, therefore, if there be any tenure it sufficeth, for if the lord distrains for that which is not due, yet he shall not be punished in trespass. 1 *Brownlow*, 214.

Lord *Hardwicke*, C. J. This is plainly a bad justification. Defendant justifies for a joint distress for two separate rents; for, though he made but one lease to the plaintiff, yet, in that lease, there are two different terms and two different reservations, one upon the stable, and the other upon the messuage; the term in the messuage and the rent thereof are to commence immediately; whereas the term in the stable was not to commence till *Lock's* surrender, and a different rent is reserved; so that, though this be all by one deed, yet they are two as distinct demises, as if they had been by two deeds, and likewise for two distinct terms: the consequence whereof is, that there must be distinct reversions; and if so, then they are distinct rents: and then the question is, whether in trespass a joint distress out of several \*premises without distinguishing how much in one and how much in the other can be justified. It is impossible in this record to take them distributively; for, though it alledges that he took goods for the whole sum of both rents, yet how can he by that tell how much he took for the stable, and how much for the messuage, so that for aught appears he may have taken out of the stable for the rent of the house. If the case in 1 *Bulst.* was a distress for †heriot service, it cannot be law, because it should shew whether it were for the service on which reserved; but if it were a distress for heriot custom, he might justify taking the best beast, be it found any where. As to the distinction between trespass and replevin, there is no difference between them as to the present question; there are, indeed, many differences in other respects; as in replevin, the avowant is, as it were, actor, and must, therefore, make a complete title; and that rule will salve all the distinctions that are between them. But that comes not up to this case; for this is goods taken for the rent of several premises upon one of them, so that he may have taken the greatest part upon premises which are not liable, so I think plaintiff must have judgment.

*Lee*, J. There is a difference between an avowry, and a justification in trespass, in respect to the strictness of setting out a title; because, in an avowry, a good title must be set out, but need not be so in a justification of a trespass; but then he must shew he is not a trespasser. Now, here, the defendant only says he entered into the several demised premises, and seized the goods upon the several demised premises for the sum of , which sum appears upon the record to be a sum due for rent upon several

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† It was for heriot custom. *Vide* the book.

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several demises, and, therefore, he should have shewn that he entered upon the several premises as he was severally entitled to enter, which is a substantial defect in a justification; for the law gives him no right to enter into any premises, but those whence the rent issues.

*Per tot. Cur'*, Judgment for plaintiff (1).

(1) Cited *arguendo*, 7 T. R. 368.

### The KING *versus* HOWELL.

In *quo warranto* the prosecutor is, upon stat. 4 & 5 *W. & M.* liable to costs, if he do not proceed to trial within a year after issue joined. See *ante*, 159.

[ \*248 ]

UPON a rule to shew cause why the prosecutor should not pay costs for not procuring an information *quo warranto* to be tried within a year after issue joined, pursuant to the stat. of 4 & 5 *W. & M.* c. 18, the words of which statute are, that the clerk of the crown shall not without express order of the court, in open court, file any information for trespasses, batteries, or other misdemeanors; or issue any process thereupon, before having a recognizance \*from the prosecutor to the defendant, in the penalty of £20 to prosecute the information effectually; and in case the defendant shall appear and plead to issue, and the prosecutor shall not at his own costs within one year after issue joined procure the same to be tried, or in case a verdict be for the defendant, or a *noli prosequi* be entered by the informer, then the court may award the defendant his costs, unless the judge certifies there was reasonable cause; and if the informer do not pay the costs taxed within three months after demand, then the defendant shall have benefit of the recognizance to compel him.

*Strange* shews cause, that these provisions in the act extend only to such informations as are filed by the coroner without order of the court, or however that these informations *quo warranto* are not within the act, being neither for trespass, battery, or misdemeanors meant by the act.

*Parker* with him, that this is not a misdemeanor, but a civil suit.

*Taylor* and *Clive* for the rule, that every usurpation on the crown is a misdemeanor; and cited *Carthew*, 503, and *Salk.* 376, *The King* and *The Corporation of Hertford*, upon an application to set aside the process upon a *quo warranto* because no recognizance first entered into. *Per Cur'*, Every information which is in its nature vexatious, is in the purview of the statute, and they accordingly set aside the process, and held it to be an information for a misdemeanor within the statute.

Lord *Hardwicke*, C. J. I have always taken this to be within the act of parliament; I believe this is the first application for costs (2); but

(2) See *ante*, 159.

but it appears to me, both from the act, and the practice upon the act, to be a case within it; as to the practice, a recognizance to answer costs has been always given in these informations, which could be only done as being within the statute. Indeed, Mr. *Strange* has endeavoured at a new construction, which, if it should prevail, would entirely defeat the act. But that can never be the meaning, or is the words of the statute, because now no information at all can be filed by the clerk of the crown without leave of the court; but the true meaning of the act, and warranted by practice, is, that he should file no information without leave, nor issue process thereupon without recognizance. As to these informations not being for misdemeanors, it is now too late to make that objection, since the practice has been always otherwise. The court, indeed, have themselves made this distinction, to grant informations for public usurpations, but if it is only of a private franchise not concerning public government, as a fair, &c. the court has sometimes refused \*them, and directed an application to the Attorney-General. You cannot in this case have a rule for what costs shall be taxed in general, for you can have no more than the penalty the recognizance extends to; but if the cause had gone to trial, you might have had your whole costs, because upon the statute of 9 *Ann.* judgment would be given for costs.

Rule for defendant to have his costs as far as the recognizance extends (1).

(1) See 2 *Str.* 33. 1042, 2 *T. R.* 143, *id.* 197. But see *Say. R.* 130, also cited foot-note, *pa.* 159, *ante.* So that the distinction seems to be this, viz. That if the relator, without having given notice of trial, do not try within the year, he is subject to costs, to the extent of the recognizance only, which

is 20*l.* But that if he give notice of trial and do not try, the relator is liable to costs generally, being within the equity of stat. 9 *Ann.* c. 20. See a distinction in the wording of the stat. 4 & 5 *W. & M.* c. 18; and the stat. 5 *W. & M.* c. 11, noticed by *Le Blanc, J.* 13 *East. R.* 4, 6.

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### The KING and The INHABITANTS of PRESTON-ON-THE-HILL.

9 *Str.* 1040. 2 *Ses. Cas.* 254, *pl.* 172. *Burr. Sett. Cas.* 77, *pl.* 24. *S. C.*

AN order of quarter-sessions was made in confirmation of an order by two justices for removal of a pauper from the parish of *Daresbury* to the parish of *Preston-on-the-Hill*, but the case not set out in the order, but there is a bill of exceptions returned with this order, that on the evidence it appears that the pauper was licensed to be a grammar school-master of the free-school at *Daresbury*, and at the same time a parish clerk, and that the court of quarter-sessions were of opinion that he had not gained a settlement in *Daresbury*: and this bill of exceptions was sealed by the justices

Bill of exceptions to an order of quarter-sessions does not lie.

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justices sitting in court; and in behalf of the parish of *Preston-on-the-Hill*, it was insisted that the order should be quashed, for that the pauper had gained a settlement in *Daresbury*, as having executed an office there for a year, according to the statute of 3 & 4 W. & M. c. 11.; and it was agreed by the court, that if the case be so, he had gained a settlement in *Daresbury*. But the great doubt was, whether a bill of exceptions lay to the quarter-sessions in this case, for the fact does not otherwise appear to the court; and upon that question it was last term ordered to be put into the paper to be argued; and now this term,

*Abney* argues that a bill of exceptions will lie, for that this case is within the meaning of stat. *Westminster*, 2. c. 31. which gives the bill of exceptions; which statute has always had a liberal construction; that statute extends to all inferior courts, for they are within the purview being most likely to err, 2 *Inst.* 487. It lies to the court of the sheriffs of *London*, as appears by a writ commanding them to put their seals, which is in the *Register*, 182. and *Trin.* 12 *Ann.* *Hunsdon* and *Miller*, or in the case of *Liverpool* (1), it was holden by the twelve judges, that a bill of exceptions must be signed by the lord keeper, in a *sci. fa.* to repeal a patent; and that was not strictly a suit between party and party, but a civil suit of the crown. That it is allowed in an information *quo warranto*, as appears by the \*case of *The King and Higgins, T. Raym.* 484. *Skinner*, 91. [101, 105], and 1 *Vent.* 366. [S. C.] In an indictment for a trespass, 1 *Leon.* 5. It lies to justices of peace in their sessions, or indictments, *Lambard's Justice*, Lib. 4. c. 13. 1 *Vern.* 175, agreed that a writ lay to command the Ch. Justice of B. R. to sign one in an indictment for a riot; and in the case of *The King and Bounce* at *Nisi prius* in *London*, *Hil.* 2 *Geo.* 11. in an information for a libel, it was allowed that it might be done by my Lord *Raymond*.

*Willbraham, contra*: That the statute [*Westm.* 2. c. 31.] does not extend to this case, because this is a proceeding in a summary way, and not according to the course of the common law; and all the cases mentioned by *Abney* are in proceedings according to the course of the common law, though some of them were at the suit of the king; yet such suits are many of them esteemed civil suits: and the word used in the statute *signis implacitatur*, must mean *ex vi termini* an impleading according to the course of the common law. That no writ of error lies to courts who proceed in a summary way. 1 *Salk.* 263, and *Carthew*, 494, *Groenvelt* and *Burwell*; and in Sir *H. Vane's* case, 1 *Lev.* 68, and 1 *Sid.* 84, it is determined that a bill of exceptions does not lie in criminal cases, but only in actions between party and party. Whether it lies in any action where the king is party is doubted; but it is settled that a demurrer to evidence cannot be taken where the king is party, unless the king's counsel assent. *Co. Lit.* 72, a. and *Baker's* case, 5 *Co.* 104, and *Cro. Eliz.* 752.

Lord

(1) Not elsewhere mentioned.

Lord Hardwicke, C. J. This is a case of great consequence. It were to be wished that a bill of exceptions would lie to justices of the peace in case of settlements, because they sometimes act in an arbitrary manner, and will not state the fact specially to the court. But on the other side, it might be of dangerous consequence to say it will lie in all cases, because it would then be made use of for vexation and delay; therefore the court must consider it upon the statute [*Westm. 2. c. 3*], and the cases that have happened thereupon. Now there has been no case that comes up to this, since the statute [*Westm. 2. c. 31*] was made, nor any cases analogous; and I think a bill of exceptions will not lie in this case. The words of the statute [*Westm. 2. c. 31*] are, *cum aliquis implacitatur coram aliquibus justiciariis proponat exceptionem*, &c. where the word *implacitatur* must mean such a proceeding as is in law an impleading. My Lord Coke in his exposition upon that statute says, it extends to all actions real, personal, and mixed, and says nothing of criminal cases, or of proceedings in a summary way; nor does he say the statute does not extend to them: but I do not find any cases that carry it further. *Lambard* does say it lies to indictments; but I do not know that that has been confirmed by the determination of any court in *Westminster Hall*. The case of Sir *H. Vane* [1 *Lev. 68.* 1 *Sid. 84.* S. C.] is contrary, \*and though it has been objected to that determination, that it is unreasonable the party should not have the same advantage where his highest property is concerned, as in civil causes; [yet] it should be remembered that the party has not many other advantages in capital cases(1), which are allowed in civil causes; as he shall not be allowed counsel, nor shall have a writ of error without leave of the crown, as was determined in one of the year books, and has never been contradicted. Nor was it ever pretended that in capital cases a bill of exceptions lay. In Sir *H. Vane's* case it is said not to lie in any criminal case; but that point is not settled, and therefore I will give no opinion as to that; my Lord *Raymond* indeed, in *The King and Bounce*, seemed inclined it would, but was not determined, and in fact none was allowed actually in that case, for I was Attorney-General at that time, and to salve the difficulty agreed to withdraw a juror. In the court of Exchequer I have known it allowed in informations, but then they are properly civil suits for the king's debt; so in *devenerunts*, but they are called the king's actions of trover, and before the late acts of parliament the king recovered nothing but the value; though indeed that has added a forfeiture, and the court does continue the old method; but it has never been determined to lie in mere criminal proceedings in other courts; but, however, this is not a criminal case, and so I shall give no opinion as to that; but it is a summary proceeding; and I know of no instance where it was ever imagined to lie in such cases. If it should lie in this case, by the same reason it ought in all cases of summary proceedings, even to proceedings before a single justice

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(1) See 4 *Hawk. P. C.* 367.

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of peace, which would introduce very great delays. This case is stronger because the proceedings are not of record, and therefore were not necessary to be in *Latin*, for they ought to be so whenever they are of record (I speak as before the late act), and was it ever thought to lie where the proceedings were not of record. In this case a writ of error would not lie, which is a strong argument that a bill of exceptions does not; for it can only be made use of upon a writ of error, and not before the same court in arrest of judgment; for the bill must be certified, and then a writ shall go to the justice to affix his seal, which is upon the words of the statute, and is to be, as the statute directs, upon complaint made; but that is not the case of a *certiorari*, which is no complaint, but only a writ to remove the proceedings into a superior court, because the party chooses to proceed there; for which reasons I think this case is neither within the meaning nor the words of the statute. That case of *Liverpool* was a new case; but that was a regular proceeding according to the course of the common law, and the record must have been delivered to this court *per proprias manus* of the Lord Chancellor, to be tried by a jury. That upon such evidence the law is so, or that such and such evidence offered is proper evidence, or improper. In those cases a bill of exceptions lies, but \*this is a proceeding before a court who are judges of the fact as well as the law, and then if we were to allow a bill of exceptions, one or two justices might send up a state of the fact in a bill sealed by them, which would be contrary to the fact appearing to the majority; therefore I think the order must be confirmed.

*Lee, J.* I think no bill of exceptions will lie in this case. In 2 *Lev.* 238, the court seemed inclined that it may be made use of either in arrest of judgment, or upon a writ of error; but I take the law to be now settled, that it can only be taken advantage of upon a writ of error, and so were the cases of *Truro*, and of my Lord *Barrington*; they were both shewed upon a writ of error; and the writ of error is to be founded upon what is the subject of the exceptions. But in these cases of justice it cannot be allowed, because the court cannot examine into one writ of error lying, which is the proper method for them to examine it.

*Lord Hardwicke, C. J.* There is that case in 2 *Lev.* [238]. But I remember a case where it came in question in the house of lords, whether it might be examined in arrest of judgment? It was a bill of exceptions signed by the Chief Baron of the Exchequer in *Ireland*, and returned into the court of Exchequer, there, with the *postea*; and the exception [was] debated upon the moving in arrest of judgment in the court of Exchequer: but the house of lords, here, were of opinion that the same court could not settle it, but that it must be examined upon a writ of error.

*Per Cur'*, Let the order be affirmed; the court being of opinion that no bill of exceptions lies in this case; which reason was ordered to be inserted in rule, lest it might be cited as a precedent of an affirmance of the order upon the merits.

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## WRIGHT and CRUST.

**M**OTION to set aside a verdict for a material variance between the declaration and the issue delivered, upon an affidavit that no defence was made at the trial; and, upon shewing cause, it appeared to be an action upon a promissory note, and two counts in the declaration, one upon the note, stating it to be dated in 1732, which was agreeing with the note; the other a count for money lent in 1733; and, as to the last count the issue varied as to the time.

*Lloyd*, for the plaintiff. That this is no material variance, for if the debt be proved to have arisen at any time before the action \*brought it is sufficient; and he cited a case, *Hill*. 1730, where the declaration was an *indebitatus* for £152, and the issue delivered was only £76, and held not to be a material variance.

*Page*, J. It is no material variance; but if it had been a variance in the date of the note it would have been material.

*Per Cur'*, Rule discharged (1).

Verdict will not be set aside for variance between the issue and the declaration containing counts upon a promissory note and for money lent, as to the time laid in the count for the money lent; *aliter* if the variance had been in the date of the note.

[ \*253 ]

(1) It should seem, that had the variance been material the verdict would have been refused. See also 2 *Str.* 1131, 1266. *Say*. R. 154. 3 *Burr.* 1682. 243, where it is said, that if not agree-

## The KING versus WRIGHT and his WIFE.

2 *Str.* 1041, [but not so full. *Ante*, 211. 3 *Bac. Abr.* title *Pauper*, (B.) S. C.]

**U**PON an indictment against the defendants for a conspiracy to charge one *Charlesworth* with perjury, application was made to the court last term that they might be admitted to defend as paupers, which was then refused (*vide Hil.* last): but upon *Hayward's* producing some precedents from the crown-office where it had been done, upon the last day of last term a rule was made to shew cause; and now this term, upon consideration of those precedents, the court altered their opinion, and granted the motion: the precedents were these:

*The King* and *Gosson*, *Hil.* 9 *Will.* III. a side-bar rule that the defendant be admitted to defend an indictment *in formâ pauperis*.

*The Queen* and *Roden*, *Pasc.* 1 *Ann.* a rule to admit the defendant *in formâ pauperis* on an indictment for a misdemeanor.

*The Queen* and *Dorothy* the wife of *John Eaton*, *Michaelmas*, 2 *Ann.* another rule to defend an indictment *in formâ pauperis*.

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On an indictment the party may be admitted to defend *in formâ pauperis*.



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*The King and Tilsley, Trin. 12 Will. III. and The Queen and Sherman, Trin. 2 Ann.* two rules marked on the side pauper.

*The Queen and Jones, Michaelmas, 2 Ann. and The Queen and Brown, Trin. 3 Ann.* two rules to admit the defendants to reverse their outlawries *in formâ pauperis*.

*The Queen and Lewis, and The Queen and Stocker, the first rule for reversing an outlawry, marked on the side pauper; the other a side-bar rule to admit the defendant in formâ pauperis to reverse an outlawry.*

*The Queen and Thomas, Hil. 3 Ann.* defendant admitted *in formâ pauperis* to prosecute a writ of error upon an indictment with effect.

[ \*255 ]

\**Lacy*, for the prosecutor, alleged that this motion is now too late, the recognizance being estreated; and for that he cited *Salk.* 380, and likewise the cases of *The King and Somers, Michaelmas, 6 Geo. I.* and *The King and Pollard, 8 Mod. 364. Hil. 10 Geo. I.* where motions were made to quash the indictments; and upon the other side's shewing that the recognizances were forfeited, the court said they came too late, and would not quash them for that reason; and he objected that the cases of reversing outlawries do not come up to this case, because there the defendant is rather a suitor than a defendant.

Lord *Hardwicke, C. J.* As to the objection that the defendant is now too late in his application, there is not much in that; in civil suits the plaintiff may come at any time to be admitted *in formâ pauperis*, and need not come immediately upon bringing his action. It is true, that after estreating the recognizance the court will not let him come to quash the indictment, because that he is entitled to only from the grace of the court; but then he may still bring the point before the court by demurrer; so then the only question upon this case is on the merits. Now when this matter was first moved, and it was taken to arise upon the statute of [11] *Hen. VII. [c. 12]*, there appeared to me to be no manner of ground for it, and (without doubt there is no ground for it) upon that statute; but now it is put upon another foundation, that it has been the course of the court to admit defendants *in formâ pauperis*, and if it has been so, it ought to be adhered to. Though there are no late precedents, yet those produced seem to be extremely strong, that the court has a discretionary power to do it. I do not see any material difference between reversing an outlawry *in formâ pauperis*, and trying an indictment, for that can by no means come within the statute of [11] *Hen. VII. [c. 12]*. As to the rules which are only marked pauper on the side, I think they are equally strong, though no admission of the pauper is found, because the admission might be by a judge at his chambers; and there is a good reason to be given why the court may do this upon indictments by a discretionary power at common law, and yet want a statute to enable them to do it in civil actions, because there were express statutes which gave costs in civil actions, and therefore the court

court could not admit plaintiff *in formâ pauperis* without doing injustice to the party; but here the crown requires no costs, and therefore it is only in effect ordering their own officers not to take fees; as to the statutes which enable defendants to defend penal informations *in formâ pauperis*; though it might be the practice of this court to admit defendants to indictments as paupers, the practice of the court of Exchequer might be different, and therefore such a statute (2 Geo. II. c. 28. [s. 8.]) might be necessary for informations \*in that court; but there is another answer likewise, for there are several statutes that give costs to informers or relators when they sue in the Exchequer, which do not give them to the crown, and therefore there was the same reason for the last statute as for the statute of [11] Hen. VII. [c. 12.] to admit plaintiffs; I am well satisfied that this is the course of the court, and it is impossible so many instances should happen by mistake, and it is wholly reasonable to be done in favour of poor men.

*Per Cur'*, Rule absolute to admit the defendant *in formâ pauperis* (1).

(1) As to where the court will re- travelling, see 2 Burr. 1040. 1 Bl. R. lieve poor defendants from expensive 233. S. C. Also 16 Vin. Abr. 259.

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[ \*255 ]

### DARLING and HILL.

*FIERI facias* at the suit of the plaintiff, to levy £121 upon the defendant's goods; by virtue whereof, the sheriff removed the goods and sold them: and the landlord of the house moved, that the sheriff might pay a year's rent to him, which was £20, and, upon his producing an affidavit, that he had given the sheriff notice that a year's rent was due before he removed the goods, a rule was made upon him for that purpose (2).

(2) See 2 Wils. 140, acc. See 2 Doug. 665, [C 2]. Also 2 Sell. 570. Bar. 199, 211. 1 Cramp. 301. Wills, 377. The plaintiff is likewise entitled in this case to a special action upon the case, upon the stat. 8 Ann. c. 14. s. 1. and which may be brought by the executor, or administrator of the landlord, 1 Str. 212. But

in order to maintain an action, a demand of the rent must be made before removal of the goods, *id.* 97. See also Woodf. L. & T. 531. 2 Tid. 1000. And *semble*, that without notice the sheriff is not bound to find out what rent is due to a landlord and pay it him, under 8 Ann. c. 14. 5 Tenni. 400.

When the landlord gives notice to the sheriff in possession under a *fi. fa.* that a year's rent is due, and then afterwards remove the goods and sell them, he may on a summary application to the court, grounded on an affidavit of the facts, be ruled to pay over such rent to the landlord.

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If a corporator be not sworn into his office within a reasonable time after his election, it is a waiver of the election.

**I**NFORMATION in the nature of a *quo warranto* against the defendant, for usurping the office of a capital burgess in the borough of *Westbury*. The defendant sets out a custom, for the mayor and capital burgesses, or the majority of them, if there be a vacancy among the capital burgesses, to assemble and elect an inhabitant into the said office which is vacant, and that the person so elected may be sworn and admitted at that or any future assembly: that there being two vacancies among the capital burgesses, he was on the 18th of *October*, 1709, at an assembly then holden, elected into one of the said two offices so being vacant; then he says, that upon the 16th of *September*, 1734, at an assembly then holden, he took the oath of office of a capital burgess, and was then duly sworn and admitted to the office of one of the capital burgesses, being at that time vacant. The king's coroner replies, and admits he was chosen as in the plea, but not sworn till 1734, though he had notice of his election; that subsequent vacancies happened, and that office into which the defendant was elected was filled up in the year 1714: and that the vacancies happened, and that the whole number of capital burgesses were filled up as often as any vacancies happened: and then he takes three traverses:

[ \*256 ]

\*1st, He traverses that there is a custom for the person elected at the same or any future assembly to be sworn and admitted *modo & forma*.

2d, That the office of capital burgess to which he was elected, was vacant at the time he took the oath, as the defendant has alledged.

3d, That he was sworn and admitted into the office to which he was chosen, in manner as he has alledged. Defendant by his rejoinder takes issue upon the 1st and 3d traverses, and demurs to the 2d; and it is now before the court upon that demurrer.

*Bootle*, for the King. The plea is bad, in not answering the information; for it does not say he was admitted to the office to which he was elected, or that that office was vacant at the time of his admission: the rejoinder is bad in not answering the traverse taken in the replication; for the replication is, that the said office was not vacant, and that he was not sworn into the office to which he was elected, which is answered only by saying, that one of the offices was vacant, and he was sworn into that. But, however, taking it upon the plea and rejoinder that he was admitted to another office than that to which elected, that cannot be good; and his resting so long after his election, before admitted to the office, is a waiver of the election in point of law.

*The*

*Draper*, for defendant. That all these points are out of the case upon this record, for they are only made inducements to the traverse which the defendant could not traverse; and if they would take advantage of this as a waiver, they should have pleaded it to be so, and have relied upon it, which they might have done, it being the case of the crown, without any traverse: and if the judgment be out of the case, then it will stand thus, that the mayor, &c. may choose, and the person be sworn at a future assembly, and that the defendant was chosen, and afterwards sworn; the place of one of the capital burgesses being then vacant. That the defendant was not chosen into a particular place or seat, like a prebendary who is chosen into such a particular stall, but into the corporation in general.

*Lord Hardwicke*, C. J. Here are two matters arise for the consideration of the court: 1st, As to the manner of pleading; 2dly, As to the merits of the question: as to the first, it is pretty odd, there are different issues, two of fact and another of law, which goes only to part; and whatever be the judgment upon this demurrer, the issues in fact must be tried: and a great deal of argument has been drawn \*from that part of the record, to which the demurrer does not go. The demurrer is upon the second traverse, and, as to that I say, the pleading is odd: all that is said in the plea is, that there was a vacancy, the traverse to which is, that the *said* office into which the defendant was elected, was not vacant at the time of swearing, as the defendant alledged; whereas the defendant did not alledge it: supposing the defendant's plea to be good in this point, I should not think the plaintiff's traverse were good, because it is of a matter not alledged; for though a matter implied in the plea may be traversed, yet it must be necessarily implied, which is not the case here. It is true, as *Draper* says, that the king may take issue upon a traverse, or upon an inducement to the traverse; but the defendant here, could not do it; and therefore the facts in the replication, which come as inducements to the traverse, must be taken to be out of the case, and waived by the coroner's concluding with a traverse; and, therefore, the several vacancies and the filling them up, cannot be taken notice of; for the plaintiff might have relied on the filling up, and need not have taken a traverse; then, this brings it to the merits, which must depend upon the defendant's plea; and in order to give our judgment, we must not resort to any parts of the plea which are brought to issue by the country; for, there may be a good title found for the defendant, if his title depends on the custom set out by him, which is a custom upon a vacancy of a capital burgess, to elect one into the office so vacant, who is at the same assembly or any future assembly to be sworn into the said office, that is, into the office into which he was elected. Now, how has the defendant brought himself within this custom? why, by saying he was elected into an office then vacant, and afterwards sworn to be a capital burgess, the office of a capital burgess being then vacant, which is not all

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within the custom, for he has not said he was sworn into the said office. If a *mandamus* goes to admit, though that does not specify the particular office, yet if the return be traversed, it comes out always upon the pleadings what particular office; for, every capital burgess is a distinct office; and though, in common parlance, every one is said to hold the same, that only means the same kind of office; so that I think, there is no possibility to maintain the defendant's plea as to this part; for we must not go into that part of the plea which is put in issue; and if we were to go into the merits, it is strange to say that a man may lie by for twenty-three or twenty-four years after his election and then come to be admitted. Suppose he had applied for a *mandamus*, and they had returned that the office was full, should we ever have granted a peremptory *mandamus*? No sure; and therefore he has neither *jus in re*, nor *ad rem*; for he has no action, and can only have a *mandamus*; and that being so, I should think this a waiver of his right, or whatever else you will call it. Suppose he had refused, and then another had been elected \*in his room, would not that be considered as a waiver of the office, to which the corporation had agreed to a new election? and surely a non-acceptance for so many years is sufficient evidence of a refusal.

*Tot' Cur' accord'*, That the merits as to the waiver, and the matter now upon demurrer, are against the defendant.

Judgment for the king (1).

(1) Cited, *Kyd on Corporations*, 364, for S. P. See 9 *East. R.* 263, where a reference is made to this case by Lord *Ellenborough*, C. J. Mr. *Ford's MS.* note of this case is subjoined, viz. "As to the general question which is put, Whether, if a person elected into an office neglect to be sworn into it for a number of years, such an omission is to be considered as a renunciation of his election? Suppose after a long time the office was filled up, should we grant a peremptory *mandamus* to swear in such a one? Certainly not. By the election the party has neither *jus ad rem* nor *in re*: and this is plain, for he has no legal action to procure himself to be sworn in. By a *mandamus*, indeed, these questions are usually tried; but a *mandamus* is no action, but only an exercise of the authority of this court over inferior jurisdictions, by which it obliges them to do justice. If it appeared that a person was elected

into an office, and his election being signified to him, he should answer that he would not have the office; and thereupon the electors should choose another; this would be an express refusal of his election; and this court would never enforce it. And I think the defendant's acquiescence in the present case is as direct a refusal. If he had been beyond sea, or under any incapacity of taking the office in a reasonable time, that ought to have been shewn: but here he is quite silent; totally without excuse: and that inchoate, imperfect right, which he gained by the election, is absolutely waived. His acquiescence and neglect to be sworn is a plain evidence that the person elected was unwilling to take the office, and that the body was consenting to accept his renunciation. So I think judgment ought to be given for the king." *Ib. id.*

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WEALTHY on the Demise of MANLEY *versus* BOSVILLE.

IN ejectment, a special verdict was given to this effect, That *Thomas Manley* being seised in fee of the premises in question, and having issue one son, named *Thomas*, and two daughters, *Jane* and *Frances*, made his will; and, after having given some legacies charged upon his lands, he devises in the following manner: "And in case my son *Thomas Manley* shall happen to die before he be married, or being married shall have no children lawfully begotten, then my will is, that my lands, tenements, and hereditaments shall remain and descend equally to my daughters and their heirs, paying such legacies within six months after the death of my son, except such jointures as my son *Thomas* shall happen to make upon his wife, not exceeding £100 *per ann.* which jointures shall likewise descend, after the death of my wife, to my daughters in case of the death of my son without children; and in case both my daughters shall die without being married, or being married shall have no children of their respective marriages, then my will is that all my estate descend to my nephew *John Manley*." And at the end of the will, after other clauses there are these words: "Item, I give and devise to my son *Thomas Manley* all my estate, real and personal, not already disposed of in this my will." That after the testator's death his son *Thomas Manley* entered upon the premises and suffered a common recovery to the use of himself and his heirs, and died without issue, living his two sisters *Frances* and *Jane*, who entered and suffered a common recovery of the premises; as to one moiety, to the use of *Frances* and her heirs, and of the other moiety to the use of *Jane* and her heirs: and they afterwards conveyed unto the defendant, and died without issue. The lessor of the plaintiff claims the premises as heir at law to *John Manley* the nephew.

This case was argued once last term by *Parker* for plaintiff, and *Filmer* for defendant; and the question was, whether the estate limited to *John Manley* the nephew was barred, or not, by the fines and recoveries? and that question depended upon this, Whether the sons or daughters took an estate by the devise, for then the estate to the nephew was a remainder and barable? or whether a qualified fee was left to descend to them, for then it would be an executory devise to the nephew, which would not be barred?

*Parker*, for plaintiff, argued, That if this be a devise to the son it must be of an estate-tail, which this cannot be, for there are not express words for that purpose, nor can it be by implication, be-

cause

his sisters entered and suffered a recovery, and died without issue; upon which the heir of *J M* entered; it was held, that the son *T* took an estate by devise; and although that might not be so clear, yet that the daughters took an estate in fee, and that the lessor of the plaintiff, the heir of the nephew *J M* was barred by the recovery suffered by them.

Where on special verdict it was found that a testator having charged certain legacies upon his lands, devised, that in case his son *T* should happen to die before he married, or being married should have no children lawfully begotten, then that his lands should remain and descend equally to his daughters and their heirs, paying, &c. except such jointures as his son should happen to make upon his wife, not exceeding, &c.; and that in case both his daughters should die without being married, or being married should have no children of their respective marriages, then he willed that all his estate should descend to his nephew *J M*; that at the end of the will he gave and devised to his son *T* all his estate real and personal not already disposed of by his

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after the testator's death his son entered, and suffered a recovery to the use of himself and his heirs, and died without issue; upon which

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cause implication in such case must be a necessary implication, *Vaughan*, 263, *Gardner and Sheldon*; whereas here is no necessity, because the devisee was the heir at law; that this is the second sort of executory devises mentioned by *Powell* in the case of *Scattergood and Edge*, 1 *Salk*. 229, and is like the executory devises in *Cro. Eliz.* 883 [probably *Cro. Eliz.* 893]: *Moore*, 644: *Dyer*, 124: 2 *Leon.* 11: 3 *Leon.* 70: *Shower's Parliament Cases*, 137: and like the case of 2 [*P.*] *Will.* 28, pl. 8: 2 *Eq. Cas. Abr.* 339, pl. 12: 2 *Kel.* 254, pl. 203: 2 *Barnard. B. R.* 209, 229, 355: 2 *Stra.* 958: 9 *Mod.* 4: 10 *Mod.* 501. See 8 *Vin. Abr.* 370, pl. 14, in notes, *Gore and Gore*(1); referred to this court by my Lord Chancellor: where the opinion returned was, that it was an executory devise to the first son of *Thomas*, and that the freehold in the mean time vested in the heir at law; and like the case of *Pinbury and Elkin*, 2 *Vern.* 758, 766. [*Eq. Ca. Abr.* 179, c. 1: *Cr. Ch.* 483: 1 *P. Wms.* 563.] He cited also 1 *Sid.* 47: *T. Raym.* 28: 1 *Roll. Rep.* 318: *Blandford and Blandford*, that executory devise cannot be barred by a common recovery.

*Filmer*, for defendant, allows that, if this be an executory devise, it cannot be barred according to *Pell* and *Brown's* case [*Eq. Ca. Abr.* 187, c. 4.: *Cro. Jac.* 590]. But this is a remainder to the nephew; for if a limitation can by any possibility be construed to be a remainder, it shall not be construed an executory devise; so is 2 *Saund.* 380, *Purefoy and Rogers*: and *Carthew*, 310: and in 1 *Salk.* 326; a limitation was rather construed to be a void limitation than to construe it an executory devise; and therefore if the son may by any construction take a freehold by the will, the court will admit such construction; but in this case he takes an estate-tail by implication, as in *Wild's* case in the 6 *Rep.* 16: 1 *Vent.* 231, *Byfield's* case there cited: *Sonday's* case, 9 *Rep.* 127: *Moore*, 127, 682: *Owen*, 29: *Hardres*, 150, *Hanbury and Cookman*. That this cannot be a descent to the heir, for that is only the devise of the same estate in quantity and quality as would descend according to 1 *Salk.* 242, *Reading* and *Royston*: whereas here is a restriction as to the jointure he is to make.

Lord *Hardwicke*, C. J. There are two rules which will go a great way towards the determination of this case: 1st, It is no matter which words come first, or which last; but that the construction must be made upon the whole according to the intention. 2dly, That no limitation shall be construed to be an executory devise if it may be a remainder; now this seems to me to be a plain devise \*to the son; however it is certainly so to the daughters, and if it be a devise to either, there is an end of the case with respect to the plaintiff, for nothing is left to descend. In the subsequent part of the will there is an express devise of all the residue; so then, take the two clauses together, for it matters not which comes first, and there seems to be an express devise to the son, and it is given

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(1) This is the case referred to above, viz. 2 *P. Wms.* 28, pl. 8.

en by the word *estate*, which is sufficient to carry a fee; so then re is a devise to his son and his heirs, and if he die without issue, remainder, &c. which as this is the case of an elder son whose ue the testator cannot be supposed to disinherit, I think according to *Wild's* case, the words are capable of that construction, and what is that but an estate-tail? How can the restraint on the nature be a restraint that this is construed to be an executory devise? It cannot, but will be void; for the son must take by descent, and consequently charges upon the land from the will will be defeated, which the testator could not intend, and therefore he must intend he should take by devise. But if this were not so far, yet as to the daughters, I think no objection can be raised; it is a devise in fee to them; and in case they die without children, &c. So that there is plainly a devise to the daughters, and they have both suffered common recoveries, which is sufficient to bar the nephew's remainder. The case of *Pinbury* and *Elkin* [mentioned above] was of a personal thing, and therefore *ut res magis lateat*, the words "after the death" were construed to mean at death; what my Lord *Vaughan* says in the latter part of *Ordner* and *Sheldon*, to be sure is not law.

And now this term, without any further argument, Court declared their opinion, that the lessor of the plaintiff had no title, and gave judgment for defendant.

A like judgment was given for the defendant, *Trin.* 13 Geo. I. an ejectment brought for the premises upon a like special verdict the Common Pleas.

1) See *Fearne's Conting. Remaind.* R. 313. 10 *East* R. 460. 2 *Williams's* 477, 2 *Doug.* 265. Also, 4 *East Saund.* 388 c.

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### COMYNS and ALLEN.

At the sittings in term in *Middlesex*.

Upon *non assumpsit* pleaded to an action on the case for goods sold and delivered; the defendant had paid £239 into court, and the question upon evidence was, whether the real demand were above £239 or under. And Lord *Hardwicke* directed the jury, that if they believed the plaintiff's witnesses who made above £239 to be due, they should find for the plaintiff, and give him as overplus in \*damages; but if they believed the defendant's witnesses, or that no more or less was due, they should find for the defendant. The jury found for defendant (2).

As to whether a sum paid into court be about or under the sum due, is referable to the jury upon the verdict of the different witnesses.

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(2) It seems difficult to comprehend *placitum* is added. See, however, 1 *Tid.* 629, 630. by this case was made the subject of report; and, probably, as uselessly a

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## IBBOTSON'S CASE.

*B. R.* will not grant an information for private usurpation of a franchise; but the proper remedy is, to apply to the Attorney-general.

*WAWKES* moved for an information in the nature of a *quo warranto*, against one *Ibbotson*, for making a warren for rabbits.

Lord *Hardwicke*, C. J. We do, indeed, grant these informations for public usurpations on the crown, but never for private usurpations of franchises; but the way is to apply to the Attorney-general in such cases. So, I remember, my Lord *Barrington*'s case, when I was Attorney-general, who had set up a fair, and the court was applied to for one of these informations, but refused it, and directed an application to the Attorney-general; and they did accordingly, and I granted it: but I would not by this be understood to give an opinion that a *quo warranto* lies for this, as if it was a free warren,

The KING *versus* EVERET.

*Mandamus* lies against an officer on stat. 11 Geo. I. c. 18, notwithstanding a penalty be given thereby.

The court will not, on motion for a *mandamus*, determine a corporation question of consequence, but will direct the writ to issue, that the question may be decided on the return.

*HUMPHREYS* and *Sclater* were candidates for the office of common council-man in the ward of *Bassishaw* in London; and *Humphreys* had the majority upon the poll; whereupon *Sclater* demanded a scrutiny, but did not deliver his objections against the bad pollers till the 12th day; whereas the stat. 11 Geo. I. c. 18, directs, That the candidate shall, within ten days next after the receipt of the copy of the polls taken at such election, deliver to the presiding officer the objections, &c. and, therefore, *Humphreys* objected to the scrutiny's going on, for the defect in not delivering the objections in ten days. And, thereupon, *Sclater* moved for a *mandamus* to *Everet*, the deputy alderman of the ward, for him to proceed in the scrutiny; and, hereupon, the question was, Whether the ten days in that act were only directory, or were compulsory; and it was objected likewise, that as the act had laid a penalty on the presiding officer if he offended in the premises, that for that reason a *mandamus* ought not to go. But *per*

Lord *Hardwicke*, C. J. As to the penalty there is nothing in it; for whenever an act of parliament directs something to be done, the court will enforce the doing it by *mandamus*; so upon the act of parliament to oblige mayors of corporations to attend at the assemblies, we always grant a *mandamus* notwithstanding the penalty.

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\*The court said, That as this is a question of great consequence, they would not determine it upon motion, and therefore granted the *mandamus*, that it may come before them upon the return (1.)

(1) Cited to S. P. 2 *Kyd* on Corporations, 344.

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MORGAN *Qui tam* versus LUCKUP.2 *Str.* 1044. S. C.

[N an action of debt upon the stat. of Q. Anne (1) against gaming upon a conviction by information, *Marsh*, for the defendant, moves for leave to plead triple, viz. *Null tiel record* of the conviction upon the information, *nil debet*, and a prior recovery upon this conviction. In a *qui tam* upon stat. 19 Ann. c. 14, the defendant cannot plead double.

*Draper* opposes it, because the statute for amendment of the law, which is the authority for double pleading, expressly prohibits its extending to popular actions, and it was refused in a popular action, in the case of *Webb Qui tam* and *Urley*, 1 *Barnard*. 3. R. 17.

Court denied it, because there is an express proviso in the statute (2), that double pleading shall not be extended to popular actions (3).

(1) 9 Ann. c. 14.

(2) 4 Ann. c. 16, s. 7.

(3) Acc. after consideration, 4 T. R. 31, citing *Bar.* 15, 353, 365. 2 *Wils.* 1. 1 *Bos. & Pul.* 221. S. P. And see *Tid.* 670. But several penal statutes enable the defendant to plead double,

e. g. 9 Ann. c. 20. 32 Geo. III. c. 58, s. 1. Therefore it seems that the language of the decision is too large; but as to whether the defendant in a *qui tam* action may plead double or not, regard should be had to the particular statute on which he is sued.

## HOCKRELL and MERRY.

2 *Str.* 1043. [S. C. but not so full.]

AT *Nisi prius* in *Middlesex* after term, the case was this. The plaintiff obtained judgment in this court against one *Snowden*, who brought a writ of error in the Exchequer-chamber, and upon the writ of error the present defendant *Merry*, and one *Rogers*, became bail, and entered into the usual recognizance to prosecute the writ of error with effect, and to pay the debt, damages and costs, if judgment should be affirmed; and judgment being affirmed, plaintiff sued out this *sci. fa.* against the bail, to which *Rogers* made no defence, so judgment is suspended against him; and *Merry* pleaded that before the cause of action accrued he became bankrupt; the recognizance was entered into the 9th of May, 7 Geo. II. 1734; the bankruptcy was the 24th of October, Geo. II. 1734; and judgment affirmed against the principal the

Where a man becomes bail in error, and before affirmation is made a bankrupt, he is not discharged from his recognizance; for till then the debt is contingent, and not proveable under the commission.

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12th of November, 9 Geo. II.; and hereupon the question was, Whether this bankruptcy of the bail happening between the entering into the recognizance and affirmance of the judgment, whether he was discharged by the bankrupt act from this demand, or whether this was a cause of action accrued before bankruptcy to verify defendant's plea.

\*It was argued for plaintiff that it was not due, being to grow due upon a contingency. It was not a debt until the affirmance of judgment, which was after the time of the bankruptcy; and they cited the case of *Chawell v. Cussanet, Michaelmas, 1728. Eq. Cas. Abr. 54. pl. 3†. 2 Will. ‡Rep. 197, pl. 159*, where a bond was given by the husband for payment of a sum of money to his wife in case she survived him; and upon the husband's bankruptcy my Lord Chancellor King refused to stop any dividend out of the bankrupt's estate to answer the contingent debt when it should happen.

For the defendant it was argued, that the debt arises by entering into the recognizance, and when the contingency happened it was a debt by the relation from the entering into it.

Lord Hardwicke, C. J. This appears to me to be a contingent duty, and not discharged by the bankruptcy. The § act says, That the bankrupt is to be discharged from all debts due and owing by him at the time he became bankrupt, and it may be pleaded in general that the cause of such action or suit did not accrue before the time of his becoming bankrupt. It is true that in that || clause of the act, which regulates how far the proceedings shall be evidence of the discharge, it does say, that the certificate shall be without further proof a full bar and discharge for any debt or demand contracted, due, or demandable; which are very strong and extensive words; but I do not think the clause ought to be understood as a separate clause to shew what shall be a discharge, but should be coupled with and extended no further than the former clause; or else the evidence of the discharge would be made to go further than the discharge itself. So then the question is only, Whether this be a debt due before this man became bankrupt; and I take it, that before the stat. 7 Geo. I. c. 31, which is to enable creditors in sums not payable at the time of the bankruptcy, to prove such debts as if they were then due; I say before that statute the opinion of the courts both of law and equity was, That creditors by bonds and notes not payable at the time of the bankruptcy could not come in as creditors under the commission; and

† S. P. determined by L. C. J. Raymond, Lord Chan. Macclesfield and Talbot. See *Green's Spirit of the Bankrupt Laws*, p. 121, in notes, 2d edit.

‡ Lord Chancellor Hardwicke said, that the case in 2 Will. Rep. 497, was barely an opinion of Lord King, and not the case in judgment; and his lordship (King) declared his opinion obiter

only; that Lord Talbot afterwards doubted of Lord King's opinion; and in a case since, Lord Hardwicke differed from him entirely, and had no occasion to alter his opinion. *Green's Spirit of the Bankrupt Laws*, 101, in notes, 2d edit.

§ 5 Geo. II. c. 30, sect. 7.

|| Sect. 41.

and that act has been construed to extend only to such securities, where the time of payment only was suspended; and not to those where it depended on a contingency whether there should be a debt or not; the case of *Tully and Sparkes*† was so; a bond entered into by the husband conditioned to pay money to the wife if she survived; the husband became bankrupt and had his certificate; \*and in an action upon the bond, plaintiff declared specially, and upon demurrer to the declaration the court was of opinion, that it being an uncertainty, whether the debt would ever become due, that therefore it was not discharged by the bankruptcy. So in the court of Chancery, bottomree bonds have been held not to be such debts, as that the obligees might come in as creditors under the stat. 7 Geo. I. This debt depends upon a contingency; for, if the judgment had been reversed, the recognizance would have been void, which is very like the case of the bottomree bonds: but this case of this recognizance is stronger than the case of bonds; because in actions on bonds you need not set out the condition, but that lies upon the defendant; but in the *sci. fa.* on the recognizance, plaintiff must in the *sci. fa.* set out the whole contingency, and shew a breach; and therefore this is fully within the reason of those cases; and I am clear of opinion, that this a debt not discharged by the bankruptcy; and that therefore the issue is against the defendant.

In this case the certificate, according to the direction of the stat. 5 Geo. II. sect. 7, was admitted to be evidence of the bankruptcy, commission, &c.

Verdict for plaintiff(1).

† 2 Ld. Raym. 1546, 1570. 2 Str. 867. Moseley, 79, pl. 51. Com. Dig. 527.

(1) This case is cited 2 Tid. 1121. 166; and also the additional notes by 2 Str. 1043, S. C. n. (1). See 1 Doug. Frere. Cooke's Bankrupt Laws by Gregg, 160, and the cases referred to n. [C]

### HILL and FLEMING.

IN an action of assault one A. was joined in the *simul cum*, and was offered to be examined for defendant, and objected to by plaintiff, because he had kept out of the way after being served with process, but plaintiff could not shew he had been served, and so he was examined at the sittings after term in London (2).

Assault; one joined in the *simul cum* may be a witness if not served with process.

(2) Cited *arguendo*, 2 T. R. 264.

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BARKER *versus* Sir WOOLSTON DIXIE, Bart.

Wife not a witness, though with consent.

IN an action for a malicious prosecution, the defendant was willing his wife should be examined (the plaintiff's wife, I suppose).

Lord *Hardwicke*, C. J. The reason why the law will not suffer a wife to be a witness for or against her husband is, to preserve the peace of families; and therefore I shall never encourage such a consent; and she was not examined (1).

(1) Cited *arguendo*, 2 T. R. 264.

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\*The KING *versus* NUNEZ.

2 *Stra.* 1043. [2 *Sess. Ca.* 377. *S. C.*] *Theory of Evid.* 102.

The maker of a promissory note not allowed to be a witness on an indictment against the payee for perjury, in denying an agreement not to put it in suit against the maker.  
[*Tamen quare?*]

AT the sittings after term in *Middlesex*, the defendant was to be tried on an indictment for perjury committed in an answer put in to a bill brought in the court of Exchequer, which bill was brought by one *Mary Lampley*, to be relieved against a promissory note under her hand, made payable to the defendant or order, and by him indorsed and negotiated; upon a suggestion that this note was given to the defendant under an agreement not to demand the money of her, but to deliver it to one *Texcira*, who should pay it afterwards to *Lampley* in satisfaction of a debt owing from *Texcira* to her, but instead of that, the defendant had indorsed to other people who demanded the money, which she paid; all which agreement the defendant by his answer absolutely denied, which is the perjury assigned. And now at the trial the prosecutor's counsel admit, that there were present at this transaction only the said *Mary Lampley* and one other person; and they admit the oath of one person alone will not be sufficient to convict the defendant, because one man's oath is as good as another's; and therefore the question is, Whether the said *Mary Lampley* might be admitted as a second witness for the king.

*Strange*, for the prosecutor, cites *Paris's* case, which is in 1 *Sid.* 413, and 1 *Vent.* 49, where, upon an information for fraudulently procuring one *A. W.* to give a warrant to confess a judgment, the said *A. W.* was admitted to give evidence against the defendant, though the court said, if he were convicted they would set aside the judgment. *Salk.* 286. Q. and Mr. *Cartney*, indictment for a cheat done to *J. S.* by imposing a mixture of beer, &c. upon him for

for *Port* wine, and *J. S.* admitted to be a witness, because in such private transactions nobody can be a witness of the circumstances of the fact but he that suffers. *Q. and Brent*, in 1711, information for extorting a bond, and the obligor allowed to be a witness. *The King and Moyse*, *Trin.* 10 Geo. I. *Stra.* 595. Indictment for tearing a promissory note payable to *A. B.* and *A. B.* admitted to be a witness, though it was objected, that the court would oblige the defendant to give *A. B.* a new promissory note if defendant were convicted.

*Kettleby* with him, That in cases of usurious contracts, if the money be paid the party is allowed to be a witness.

On the other side, The case of *The King and Whiting*, *Salk.* 283, was cited and relied on as the ruling case ever since, which was information \*for a cheat, in that he had a promise from his mother-in-law of a note for £5, and by slight got her hand to a note for £100, and the mother refused to be a witness, because she was concerned in the consequence of the suit.

Lord *Hardwicke*, C. J. I am fully satisfied that *Mary Lampley* cannot be a witness in this case; there have been variety of determinations in cases which have an analogy to this; *Paris's* was determined as it has been cited to be, but it was contrary to the opinion of *Twisden*, a very learned judge, which takes away from the weight of the case very much; and since that case, the courts of justice seeing the inconvenience, have made stricter determinations than they used to do; in prosecutions for forgery they will not admit the person, on whom forged, to be a witness, because he is then swearing to overturn a charge upon himself, and I think this case comes up to that. As to the cases of usury, the rule has been upon indictments for usurious contracts, not to admit the party in the contract unless the money claimed thereon has been paid; and the reason is, because then he is unconcerned in interest, there being no remedy either in law or equity to recover that money back again; for my Lord Chief Justice *Treby* was of opinion, that where there had been an unlawful contract of a bad nature, the party should not be admitted to bring an action as for money had and received to his use, because he is *particeps criminis*, and a court of equity would not encourage a remedy, not even for the surplus interest, because that would give encouragement for such contracts. In courts of equity, if an answer is put in which denies the equity of the bill, the court will not suffer one witness to be sufficient to set aside that answer, because one man's oath is as good as another's; and I believe the courts of equity took that rule from the grounds of allowing evidence in perjury: but where are other circumstances, though one witness only against an answer, I have known my Lord *Cowper* and my Lord *King* also direct an issue to try the fact, but then they ordered the answer to be read in evidence upon the issue, that the defendant might have advantage of it; so then *Mary Lampley* not being sufficient witness, there is but one witness, which is not sufficient to convict a man of perjury

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jury unless there were very strong circumstances, because one man's oath is as good as another's(1).

After this opinion delivered, the prosecutor's attorney said he had another witness who was by at this transaction.

Lord *Hardwicke*, C. J. (apprehending some ill practice in keeping up this witness until they heard his opinion) said, I will not try it now then, until the cause has been heard in the court of Exchequer; Lord *Raymond* did so in *Rhodes's* case, and therefore withdraw a juror by consent.

(1) See pa. 358, *post*. The question, Whether the testimony of a party injured by a crime for which another stands indicted, shall be admitted against him, has received various and contradictory answers. By the above case, and those cited below as in point, it has been decided, that the testimony of such party is not to be received. 2 *Str.* 728. *Bull.* L. N. P. 218. S. P. In 2 *Str.* 1299, 4 *Burr.* 2251, however, the authority of *The King v. Whiting*, 1 *Salk.* 283, upon which this case is de-

cided, is denied, or rendered doubtful; and in *Bartlett v. Pickersgill*, cited by Lord *Mansfield*, C. J. 4 *Burr.* 2253, and in *The King v. Boston*, 4 *East.* R. 572, finally overturned. By this last decision a much agitated, and, until then it should seem, not generally understood question, is set at rest: and this upon principle; namely, that in no case where a person has been examined on the trial of an indictment can the verdict therein be used for him. See *Peak.* L. E. 161, n. 4th edit.

[ \*267 ] \*AMBROSE and others, Assignees of the Estate of AMBROSE, a Bankrupt, versus CLENDON.

2 *Str.* 1042. S. C.

A creditor of the bankrupt, but who releases the assignees, is a competent witness to prove the act of bankruptcy.

A commission of bankruptcy is well founded upon a bond given for a pre-existing debt, although it appear that the bond were executed subsequently to the act of bankruptcy.

AT *Nisi prius* at *Guildhall*, the day before the term by appointment, this cause was tried. It is an action of *trover* directed by my Lord Chancellor to try, Whether goods of the bankrupt taken in execution on the 8th of *November* by the defendant, be rightly taken or not; and whether *Ambrose* was a bankrupt or not? And, after having proved the petitioning creditor's debt, the commission and assignment to the plaintiff, the plaintiff entered upon proof of an act of bankruptcy.

And for that purpose a footman of the bankrupt's was first produced, to whom defendant objected as being a creditor; and being asked the question, he said he was a creditor formerly, and had had none of his debt paid; but relied upon the assignees' goodness; reckoned himself no longer a creditor, and had no promise of payment. But

Lord *Hardwicke*, C. J. allowed him, for he is not a creditor.

Then his release was read, which was made to the assignees only, and objected it ought to be made to the bankrupt likewise; for, as this creditor will not come in under the commission, he has an interest in the surplus of the estate.

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Lord *Hardwicke*, C. J. There is no occasion for the release to be to the bankrupt, and the interest which you mention him to have in the surplus rather strengthens his evidence for the assignees; because he is thereby rather adversary to the success of the commission.

Another witness, in proving the bankruptcy, was relating what had been said by the bankrupt at different times about his bad circumstance, and fears of being arrested.

Lord *Hardwicke*, C. J. It is not usual to allow such evidence, unless when it is concomitant with facts; as what the bankrupt says when he is removing his books, or his goods, &c. but not else.

And the plaintiff's witnesses proved him a bankrupt very clearly; but it was observed by defendant's counsel, that they had proved too much, for now the bankruptcy appeared to be before the giving the bond to the petitioning creditors, which was the debt proved for him \*in the beginning of the cause; and consequently that bond being after the bankruptcy, was as against the creditors a void bond, and the petition and commission on such a debt must fall to the ground, and the plaintiff be nonsuit. It appeared likewise upon the evidence, that this bond creditor was at the time of the bond, and had been long before the bankruptcy, a simple contract creditor for a large sum, and that the bond was given as a higher security for that debt.

Lord *Hardwicke*, C. J. Here are two questions, 1st, Supposing the act of bankruptcy appears to be before the petitioning creditor's debt was contracted, whether that creditor's petition can support the commission. 2dly, Whether in this case the petitioning creditor's simple contract debt, which was due before any act of bankruptcy, makes him such a creditor as to support the commission, notwithstanding the bond given for the same debt? or whether the giving that bond is not such an extinguishment of the simple contract debt, as that he can now be considered as a creditor only from the time of giving the bond.

As to the first, if there is a clear act of bankruptcy proved, and not purged by any subsequent actings of the bankrupt; and the petitioning creditor's debt should appear to be after such act of bankruptcy, a commission issuing upon that petition would issue erroneously, because such petitioner ought to be a creditor before the act of bankruptcy; for, as the commission by relation avoids all mesne acts of the bankrupt, consequently the petitioning creditor's debt must be thereby avoided: which is to make the commission trip up its own heels, and is an absurdity. It is true some inconveniences may happen by this means, by secret acts of bankruptcy, which those who deal with the bankrupt cannot have notice of, and therefore it is expected that acts of bankruptcy should be very fully proved, and beyond possibility of being purged; and if any subsequent transactions have been by the bankrupt, it should be left to the jury whether the act were purged, or was an act within the intent

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tent of the statutes of bankruptcy or not; but in this case here is a very clear proof of an act of bankruptcy.

As to the second question, I think this petition is sufficient to support the commission, and that the acceptance of the bond is not an extinguishment of the debt as to this purpose; for the only question now is, Whether there was a debt subsisting sufficient to support the commission, and not of what effect it is with regard to the bankrupt himself? The reason why it is an extinguishment with regard to the party is, because the bond is a debt of a higher nature; but in this proceeding both debts are the same. And it is \*every day's practice, that if a creditor by simple contract should, after an act of bankruptcy committed, get a judgment confessed by the bankrupt for the same debt, and take the bankrupt's goods in execution, if the assignees bring an action of *trover* against that creditor to recover, yet that very creditor is afterwards admitted to come in and prove his debt under the commission, notwithstanding his acceptance of a judgment after the bankruptcy; and he comes in, in that case, by force of his simple contract debt; for all creditors are entitled to relief under the commission; so that with regard to the commission, he is still considered as a simple contract creditor; therefore I think the acceptance of the bond has not, as to this proceeding, extinguished his simple contract debt, so that I think the commission is well founded.

Verdict was given for plaintiff (1).

(1) Cited *arguendo*, 1 H. Bl. 464. 1 Taunt. 77. And see *Cooke*, B. L. 19.—Relative to the principle upon which the footman's evidence, as to what direction he received from his master the bankrupt, was admitted, see 5 T. R. 512, 6 East. R. 188, and the cases therein cited. See also 2 Maul. and Selw. R. 123, 131, where Lord Ellenborough, C. J. observing upon certain inferences drawn from this case *arguendo*, is reported to

have said, that Lord Hardwicke's judgment in this case was founded on this distinction, viz. that although the bond was an extinguishment with regard to the bankrupt himself, because it was a debt of a higher nature, yet in the proceeding under a commission of bankruptcy, both debts were the same; or in other words, in bankruptcy the creditors all come in *pari passu*.

# TRINITY TERM,

9 Geo. II. 1736. B. R.

PHILIP Lord HARDWICKE, Lord Chief Justice.

Sir FRANCIS PAGE, Knt.

Sir EDMUND PROBYN, Knt. } Justices.

WILLIAM LEE, Esq.

JOHN WILLES, Esq. Attorney-general.

DUDLEY RYDER, Esq. Solicitor-general.

## ANONYMOUS.

UPON the master's report as to the regularity of a judgment and execution, the case was this: That the defendant being indebted to the plaintiff, did for his greater security give him a bond and a warrant of attorney to enter up judgment upon a *mutuatus*; but the condition of the bond was, not to pay the money till the 6th of *July* next, and this bond and judgment were for the same debt; the plaintiff entered his judgment, and took the defendant's goods in execution in *May* last.

*Per Cur'*. As this judgment was for the security of the same debt for which the bond was given, we shall consider the condition of the bond as a *cesset executio* upon the bond until the time of payment, and therefore the execution in this case must be set aside, but the judgment is regular and that must stand.

Where a bond is given conditioned to pay at a future day, and a warrant of attorney to enter up judgment thereon, but judgment is signed and execution issued before that day, the judgment will be held regular; but the condition operating a *cesset executio*, the execution will be set aside.

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THE question was, Whether service of a rule to shew cause, why there should not be an information for a libel, upon the defendant's wife, the defendant being at that time of service out of

Service of a rule nisi for an information for a libel upon the defendant's wife, he, at the time of service being in *France*, held bad.

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the kingdom in *France*, were good service; and it was allowed, that generally, service on the wife in these cases is good service; but the reason of that is, because the law presumes the husband must have notice of it, by reason of conversation and intercourse that is between them; but that in this case the presumption ceases; and therefore the court, upon this matter being shewn for the defendant, held it was not good service.

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SMITH *Qui tam, versus* GIBSON.

2 *Stra.* 1045 [S. C. but not so full].

In an action on the case for suing the plaintiff in the Admiralty, for part of a ship belonging to the plaintiff and another; and where, in such action, the detention of the whole ship was deemed to be alleged in the declaration by way of consequential damage, held, that the defendant shall not be at liberty, on account of a joint injury sustained by the detention, to plead the non-joinder of the other owner in abatement; for the suing the plaintiff personally in the Admiralty was the gist of the action.

IN an action upon the case for double damages, upon the statute of 13 *Rich. II. c. 5*, 15 *Rich. II. c. 3*, and 2 *Hen. IV. c. 11*. The declaration, after reciting those statutes, sets forth, That the plaintiff had in his possession a certain ship, and was part owner of the greatest part thereof within the body of a county, viz. at *London*; the defendant pretending a right to a thirty-second part thereof, by virtue of a bill of sale pretended to be made on the high seas, whereas in fact, no such was made on the high seas, but within the body of the county, viz. at *London*, did implead the plaintiff in the court of Admiralty concerning the same, and caused the said thirty-second part, by virtue of a process prosecuted out of the said court against the said ship, to be arrested in the river *Thames*, and by colour of the said process, did cause the said ship to be, under that, detained there for a long time: by reason whereof, plaintiff lost the benefit of the said ship, and was put to several expences, which he lays to his damage £1000. Defendant pleads in abatement, That at the time of the said trespass and contempt, and until the time of the plaintiff's exhibiting his bill, one *T. B.* was and is a part owner with the plaintiff, in said ship, as tenant in common: to which plea plaintiff has demurred. This was argued last term by *Mr. Bootle*, junior, for plaintiff, and *Mr. Burnet*, for defendant. And this term by Serjeant *Chapple*, for plaintiff, and by *Mr. Barnardiston*, for defendant.

For the plaintiff it was argued, That it is immaterial in this action, who is owner of the ship; for the gist of the action is the suing \*in the Admiralty, which is personal to the plaintiff; and the detention of the ship is no part of the gist of the action, but is only laid as consequential damages; and may be given in evidence, as in *Child and Sands, Carthew*, 294(1). That upon this declaration it appears the plaintiff was more than part owner; for it is laid, that he had the occupation of the ship, which might be as master thereof. That where the action is grounded on a tort which

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(1) Also, but differently, 5 *Lev.* 351; 4 *Mod.* 176, 181. *Skin.* 334, 361.

is joint and several in its nature, it is no abatement. So is *Carth.* 295; and here, the action is joint and several with regard to the ship. That if the court should be of opinion, that for the detention all the parties should have joined, then they will take that to be only laid in aggravation of damages, 1 *Salk.* 119.

For defendant was cited the case of *Child and Sands*, which is reported in 1 *Salk.* 31; 4 *Mod.* 181; 3 *Lev.* 351; *Skinner*, 334; and *Carth.* 294: which was a suit upon these statutes, and objected, that all the proprietors being joint owners should have been joined, but held well being after a verdict; but resolved, That if it had been pleaded in abatement it would have been well; but *Carth.* they admit, reports the contrary as to that; that though a tenant in common cannot plead his tenancy in common in abatement, a stranger may plead it. 1 *Salk.* 4; *Faresley*, 104. That joint tenancy may be pleaded in abatement in trover, *Salk.* 290; *Skinner*, 12, 640. So, likewise, in trespass, *Cro. Eliz.* 554. To this point were also cited 1 *Sid.* 224; 1 *Lev.* 3; 2 *Lev.* 20; *Latch.* 152; *Sir W. Jones*, 142. It was likewise urged for defendant, that the detention of the ship laid in this declaration, was a distinct charge of damage to the plaintiff's property, in which property others having a joint interest ought to be joined.

Lord *Hardwicke*, C. J. Here are three questions: 1st, Whether the suing by the defendant in the court of Admiralty be the cause of action in this case? 2dly, Whether the detention of the ship be the cause of action? 3dly, Whether both of them are two distinct causes of action in this case?

And I think the cause of action in this case, is the suing in the court of Admiralty; and that the detention of the ship is not the cause of action, but only a consequence of the suit in that court; and if so, then this is a right action and well brought; and there is no ground to abate the bill: and that being the ground of the action, there is no colour for any other person's joining with him; for the contest was about the 32d part of the ship; and defendant took out a citation against the present plaintiff only, therefore, it is he, only, that is grieved by that suit, and consequently, he, alone, has cause of action according to the statute. And this is what distinguishes this case \*from the case of *Child and Sands*; for, properly, in that case, there was no suit in the court of Admiralty; and that made one great question in the case, Whether an action would lie at all for that proceeding, as for a suit within the statute; for there the ship was arrested without any suit instituted: and for that reason, there being no suit, but only an arrest of the ship, the court said, that all the owners ought to have been parties; but, in this case it is expressly alledged, that the defendant impleaded the plaintiff in the court of Admiralty; and the arrest of the ship is only by way of process in that suit. And the nature of the thing, itself, shews the detention to have been consequential. And then it comes to what is said in the case of *Child and Sands* in *Salk.* That the laying consequential damage, is but matter *ex abundanti*

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and will not hurt; and it might be given in evidence. If the suing be the cause of action, then that is such a cause of action, as the other owners cannot join in, for they were not sued. If the detention in this case were another cause of action, then the rule is as laid down in *Godfrey's case*, 11 Co. 45 b. That where a man has two causes of action in his writ, and of his own shewing, it appears that for one of them he can have no other remedy, the suit shall abate only as far it is abateable; and he may go on for the rest; and the reason is, because if no other writ lies, it is considered as if it had never been part of the demand and entirely nugatory; but if it appears that for one of the matters that writ lies not, but that he may have another writ, in another form, there the writ shall abate entirely, and shall not stand for that part which is good; but I think that in this case the detention is not the cause of action, but only consequential damage.

*Lee, J.* If the detention were the cause of action in this case, I should think this a good plea in abatement: and though it is said in *Carth.* 295 (1), that an action founded on a tort is not abateable on such a plea, that is a mistake, as appears by the opinion of the court in that case, as reported in all the other books. And so was the old law, as appears by the *Digest of Writs*, fo. 46, b. Joint-tenants must join in trespass, and if they do not, it is pleadable in abatement. But, however, the case will depend on the manner of its being stated in the declaration. Now, the first part of the declaration is a complaint that is merely personal to the plaintiff; for it is, that he himself was personally sued, and consequently was the person aggrieved; and therefore, he, alone, might for that maintain an action. And upon the other part of the declaration, the question is, Whether it answers to such a charge of a detention, as that all the proprietors ought to join; and, if that were the gist of the action, I should think they ought; but I think it is not the gist of the action, but is alledged, merely, as consequent to the arrest of the ship, and was not necessary to be alledged. Neither was the plaintiff in \*this action entitled to damages for the detention of the whole ship, but only for a 32d part; so that the allegation of a detention is but *ex abundanti*.

Judgment that defendant answer over (2).

(1) It is not so said there in terms.

(2) The general question is ably discussed, 2 *Wms. Saund.* 116, n. (2), 1 *Id.* 291, n. (4); although no mention of this case appears therein. Nor does this case appear to me to clash with the decisions there cited; since it turns upon its being stated in the declaration, that although the ship, which was the joint property of the plaintiff and

another, was in fact injured, yet that the suing the plaintiff in the Admiralty was the gist of the action, and not the injury to the ship or its owners, generally, as in the case, 1 *Salk.* 31, which see, together with the 5th resolution: and also the other cases cited, 2 *Wms. Saund.* 116, n. (2), particularly 6 T. R. 766. See also 2 *Bos. and Pul.* 120. 1 *Chitt. Pl.* 50 to 54.

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## STOUGHTON and REYNOLDS.

*Fortesc. Rep.* 168. 2 *Stra.* 1045. S. C. S. P.

PLAINTIFF declares, That he was chosen churchwarden of the parish of *All Saints* in *Northampton*, and therefore ought to be admitted and sworn into that office by the defendant; and for that purpose, offered himself to the defendant, who refused to admit him; and the declaration sets forth, That the plaintiff obtained a writ of *mandamus* to compel the defendant to swear him to be churchwarden of that parish, which defendant refused to do, but made a return to the writ, That the plaintiff was not chosen a churchwarden of the said parish; which the plaintiff avers is a false return: whereupon issue being joined, a special verdict was found to this effect: That the said parish is an ancient parish, of which, two of the parishioners have used always to be churchwardens; and that by the custom of the parish, one of the churchwardens is to be named by the vicar, and the other to be elected by the parishioners. That in *Easter* week, in the year 1734, the vicar named his churchwarden, and the parishioners elected the plaintiff to be the other, who were both admitted and sworn into the office, and continued in the same until *Easter* week 1735, and, then, a new election came on, which is the election in question; and at an assembly holden for that purpose, there were present the vicar, and the two churchwardens, and many other parishioners. They further find, that one *Chapman* was then named by the vicar to be his churchwarden for the year then ensuing; after which nomination the plaintiff and one *Farrin* were candidates for being the other churchwarden: that, thereupon, a poll was taken, and several of the parishioners polled for the plaintiff, and others polled for *Farrin*; that before all the parishioners polled, the vicar being in the chair, did with the consent of the said *Chapman* adjourn the assembly until the next day, which adjournment was opposed in behalf of the plaintiff by some of the parishioners; and, upon the adjournment, several parishioners in the interest of the other candidate *Farrin*, went away, and several others remained and continued the poll and took several votes; and at the close of the poll that day, the plaintiff had a majority of votes; that upon the next day the vicar went on with the poll, and then *Farrin* had a majority, but whether, &c.

\**Abney*, for plaintiff, admits, That by the 89th canon, in 1603, the churchwarden is to be chosen by the minister and parishioners, or one by the minister and the other by the parishioners, &c. but that canon has been determined not to bind the custom of any parish, *Cro. Jac.* 532. *Warner's case*, 2 *Roll. Abr.* 287, pl. 50. *Cro. Cha.* 551. *Evelin's case*, *Hardres*, 378. *Dawson and Fowle*.

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Lord Hardwicke, C. J. You need not cite cases, that point is very settled; that canon cannot controul the custom.

*Abney*: That, of common right, the choice of churchwardens is in the parishioners, and if the incumbent chooses one in any place, it is but by usage, *Carth.* 118. That a man, though he lives out of the parish, in respect of lands in the parish, may vote for churchwardens, *Jeffrey's case*, 5 Co. 66. [*Cro. Eliz.* 659. *As. Ent.* 441. *Hugh. Ent.* 217.] That the majority of parishioners, after a summons of the parishioners, may bind the rest even in making a rate. 1 *Mod.* 194, 236. 2 *Mod.* 222.

*Bootle*, for defendant: That plaintiff's election depends on the vicar's having, or not having a right to adjourn the assembly; now as to that it is found, that there was an assembly, and that the vicar was in the chair; which is a finding that he presided at the assembly according to the common meaning of the word; and, consequently, the power of adjournment must be in him, or at least, in him or in the other churchwarden; since the plaintiff by applying for a *mandamus*, is concluded to say, he was churchwarden at that time. But supposing that the plaintiff was duly elected, yet here it appears he had no cause of action, for he has received no damage; for there was no occasion for a *mandamus*, he being in possession of his office without it, and consequently the return to it, though a false one, can be no ground for an action; as his election in 1734, was until another should be admitted and sworn: he continued until then in his office; like as when a mayor is chosen to continue for a year, and until another is chosen, he continues in office, even after a new election, if that election is void. That before the canon 1603 [89th], a custom for churchwardens to continue two years in office was good, as appears by the year-book of 26 *Hen. VIII. fo. 5, pl. 25.* The rule laid down in *Hob.* 267, is, That to give a cause of action, there must be some damage already happened, or else inevitable; now in this case, and this is an action for damages, the only damage that can arise, must be, either, for the withholding plaintiff from the profits of his office, or for the expence he was at in procuring the *mandamus*; now as to the expence, there is nothing of that laid in the declaration, but only that he had not the possession and privileges of the office; and no damage can be intended more than is \*laid: and, as to the profits of the office, he was in possession, as I said, even without a *mandamus*. Besides, this is not an office of profit, 3 *Lev.* 362, *Ward* and *Bramston*; he cites also a case of *Lewis* and *Lewis*, *Hil. 2 Geo. II.*, where, in an action on the case for labouring a jury, after a verdict, upon the writ of error, the question was, Whether there was any cause of action; because the words *ratione inde*, viz. of the labouring the jury, the party had obtained a verdict, was a sufficient allegation of damage sustained?

Lord Hardwicke, C. J. The doubt referred to the court by the jury is, Whether the defendant is guilty, or not, of a false return? that depends upon the plaintiff's election being good, or not so; and

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and depends on the adjournment of the assembly, whether being made by the vicar and one churchwarden, it be a good adjournment. There is nothing to be found relating to this in the books; and I hear no reasons given that satisfy me that it was a good adjournment; whether it was so, or not, depends on a previous question, in whom the power of adjournment was? and that was said to be in the vicar and one of the churchwardens. That must be, if it be so, either by custom, but in this case no such custom is found; or, by some rule of common law; but I do not find any resolution, or even opinion, that such is vested in the vicar or churchwarden, or even to give the vicar a right of presiding. There is indeed a notion that he has a right to preside, but that has taken its rise from special vestries; and there the custom or the act of parliament which establishes such vestries, generally nominate him to preside. Is the right then in the churchwarden? I find no authority that says it is; and if it were, it is not to be imagined to be in one alone; why then, what is the consequence? It is, that the right is in the assembly itself; for if they be an assembly, all consisting of equals, and there be no custom, nor rule of law, to direct the adjournment, the right must be in the persons which constitute the assembly. It is true, inconveniencies may arise from this; for it will require as much time and ceremony to settle, whether the assembly shall be adjourned, as for any other question; and therefore the law where it has intermeddled at all, has provided a remedy for that inconvenience; as in election for knights of the shire, the sheriff might adjourn by common law, for there is no act of parliament which gives him that power, though there are acts to restrain it; and yet the suitors are the judges of that court, and not the sheriff. There might be an inconvenience on the other side, in this case, to say the power is lodged in the vicar; for he might make use of it to influence which churchwarden he thought fit, against the sense of the majority of the parishioners. As to the want of a cause of action, I think in this case, there is plainly a cause of action; for, though to every action on the case there must be *injuria & dampnum*, here it is not found that the custom to continue \*till another chosen: only, generally, a custom to choose at *Easter*; and afterwards in finding that plaintiff was elected, they say, he was to continue until another chosen according to the custom aforesaid, which is not the custom. And whatever the jury find beside the custom may be rejected, but that is not material; for a mayor elected the second year again, may have an action for a false return upon a *mandamus*; without doubt, for it leaves his office to be disposed; and in this case it is found, that there was another candidate, who, actually, did dispute the office with the plaintiff: and, though the mayor might continue if there were no new choice, yet, if there is a new choice of himself, he is not in by old choice, but must go upon the new one.

*Probyn, J.* The parson is not a constituent part of the assembly,

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bly, but it must be very well held without him; and the majority must determine all questions.

*Lee, J.* If this was not a legal adjournment, they did right in completing the election; and if he was chosen he had a right to a *mandamus*; and if he had a right to be admitted upon his election, the denial thereof is an injury, and, therefore, must be a damage. There is no difference as to the precedency of the parson in voting above the rest of the parishioners, only this distinction, that the parishioners vote in respect of their assessments, and the parson votes in respect of his freehold; and therefore it has been said he may vote, though he pays no assessments. *Hackwell's Modus tenendi Parl. fo. 23*; which is a book of good authority, that in all councils and elections the majority binds, for which he cites *15 Edw. IV. fo. 2*. I think this was not a good adjournment.

*Per tot' cur*, Judgment for plaintiff (1).

(1) See 7 *East. R.* 573, 577.

### STAPLETON and STAPLETON.

Where the legitimacy of her son is in question, a mother may be a witness to prove her own marriage.

AN issue, directed out of Chancery, was tried at the first sittings in term in *London*; and the issue was, Whether the father of the plaintiff was the legitimate son of *Philip Stapleton*? And it was admitted by the defendant, that the plaintiff was *Philip's* eldest son by *Margaret Gage*, but his defence is, that the father was not then married to her, but was so afterwards, as he proved by the register; after which the defendant was born; so that he was the eldest lawful son; the plaintiff had only presumptive evidence of a marriage being had between them before his birth; and defendant produced his mother, the father's wife, to be an evidence to the plaintiff if he liked it; and

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\**Per Lord Hardwicke, C. J.* She may be a good witness to prove her own marriage; but plaintiff was afraid her evidence would be against him, and so would not examine her (2).

(2) See *The King v. The Inhabitants of Reading*, ante, 79, 84, and the cases there mentioned, n. (5). The report of this case generally referred to is 1 *Atk.* 4, as cited 2 *Cowp.* 593. In *Lord Valentia's* case in the House of Lords, adjudged April 22, 1771, the countess dowager, having no interest, was admitted as a witness to prove the fact of her own marriage, and this upon a

question as to her son's legitimacy. Cited by *Lord Mansfield ubi supra*. So in the late case respecting the *Berkeley* peerage, in the House of Lords, Lady *Berkeley* was admitted to give her extraordinary but little credited testimony, as to her marriage with *Lord Berkeley* previously to the birth of her first son by that nobleman.

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CLAVEY and DOLBIN. At same Sittings.

**A**CTION upon an inland bill of exchange against the acceptor; and the evidence of an acceptance was this, the bill having been presented for acceptance, and refused by the drawee because he had no effects was returned into the country, and a little while afterwards the bill being hazardous, plaintiff's agent met the drawee, and asked him if he could not help to secure him his debt, and he said he would if he could, for he had now some effects in his hands; whereupon the agent immediately wrote for the bill, and presented it to the drawee, who bid him leave the bill and he would examine into it; and it was left with him eight or ten days, and then the agent called again, and the drawee offered to let him sell some of the effects and pay himself, which the agent refused, and thereupon this action is brought, and *per*

To charge a drawee of a bill of exchange, there must be evidence of a contract to accept. But evidence that the drawee said he would help the holder if he could, for that he had then some effects; which, after the bill had remained in his hands ten days, he offered the agent of the holder to sell and pay himself, and that the drawee had desired that the bill should be left in order that he might examine into it, is insufficient to prove a contract to accept.

Lord Hardwicke, C. J. Indeed it has been adjudged, that a parol acceptance will be good; and possibly leaving the bill ten days with the drawee, might of itself be such a consent as to amount to an acceptance; but this not so; for you must take the whole together, and there must be evidence of a contract to charge the acceptor; whereas it is otherwise upon this evidence. And Lord Hardwicke said, that since the case of *Lumley and Palmer, Michaelmas, 8 Geo. II.* (1), where a parol acceptance was held good, and Lord C. J. Eyre's opinion cited to the contrary; that he himself had talked with Eyre, and they looked into the books together, and he changed his opinion and agreed to the resolution of *Lumley and Palmer*.

Plaintiff nonsuit (2).

(1) *Ante*, p. 74.

(2) Although the mere retention of the bill by the drawee, when left with him for acceptance, for a time far exceeding the usage, was not in the present case held to charge him as the acceptor, yet where such retention appears to have been his own act, and not in consequence of the unsought suffer-

ance of the holder or his agent, as in the principal case the retention appears to have been, it has been held sufficient to charge a drawee, and this without impeaching the authority of the principal case. See *Harvey v. Martin*, 1 *Campb. C. N. P.* 465. See also 6 *East. R.* 199. 4 *Esp. R. C. P.* 270.

### The KING versus THOMAS and his WIFE.

**D**EFENDANTS being convicted of keeping a disorderly house, it is moved in behalf of the wife, that the court would give judgment, she having been in prison ever since the conviction

Where husband and wife are convicted of a misdemeanor, and previously to judgment the husband absconds, the giving judgment against the wife shall not, on that account, be delayed.

band absconds, the giving judgment against the wife shall not, on that account, be delayed.

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conviction in *Michaelmas* term last ; this was opposed by the prosecutor's counsel, because the husband is not also here, for he ran away from his bail ; and they think deferring the judgment against the wife might be a \*means of making him surrender ; and a case was mentioned of *Charlton* and *Coxe*, who were jointly convicted for forging a warrant of attorney.

*Lee, J.* That was a motion by them for a new trial, and the court refused to hear the motion till both were present. But *per Cur'* It is no reason to delay the judgment, because the husband is not here, for he is not in the power of his wife. Then as to the nature of the judgment, affidavits were read to the prisoner's being in so weak a condition, that it was thought a bodily punishment would be to kill her downright.

*Per Cur'*. The ordinary judgment in this case is the pillory, but for misdemeanor the court is not tied down to any particular punishment ; and, as it is represented that she is unable to suffer a corporal punishment, and that, being a married woman, has nothing to pay a fine withal, the punishment must be imprisonment. The judgment was, That she be imprisoned for a year, and then to find security for her good behaviour for seven years (1).

(1) The offence of keeping a bawdy house is indictable as a common nuisance, and a *feme covert* is punishable as if she was sole. See further *stat. 25 Geo. II. c. 36, ss. 4, 6, 7, 8, 9, 10.* Also *Hawk. P. C. c. 61, s. 2. c. 74.*

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### BARKER versus Sir WOOLSTON DIXIE, Bart.

*Ante*, 264. S. C. 2 *Stra.* 1051, [but not so full] *Andr.* 261, in marg.

ACTION for maliciously prosecuting the plaintiff for felony, for which she was tried at the *Old Bailey*, and acquitted ; and upon Not guilty pleaded, the jury gave a verdict for the plaintiff and 5s. in damages, and now

*Strange*, in behalf of the plaintiff, moved for a new trial, because the damages are too small ; for as the jury have, by their verdict, found that there was no probable cause for prosecuting the plaintiff, they should, at least, have found the expences, which the plaintiff proved at the trial she had been at in the prosecution ; and, therefore, he would infer that it was a verdict against evidence. And he cited a case of *Woodford v. Eades*, *Pasc. 7 Geo. I. Stra.* 425, where a wager was laid, and was as appeared by the contract for £100, which was deposited in the hands of a third person ; and an action being brought against the stakeholder, the jury found for plaintiff, and gave but one penny damages ; whereupon the court granted a new trial because the damages were too small,

small, and that determination was upon the case in *Salk*. 647: he cited also the case of *Par v. Purbeck Nesbet, Michaelmas*, 10 Geo. I. *Mod.* 196, 213, which was an action of covenant for non-payment of rent reserved upon a lease for years, and after judgment by default; upon a writ of inquiry, the plaintiff proved £150 due for rent, and yet the jury gave but one shilling damages, whereupon the court set aside the inquiry. There is the same reason for doing \*it in this case as for excessive damages, and the first case where a new trial was for excessive damages, was after a trial at bar in *Styles's Reports*, 466.

Serjeant *Chapple* for the defendant, observes, That in the case in 2 *Salk*. 647, the court allowed the rule to be, that no new trial or new writ of inquiry should be for too small damages, and granted a new inquiry in that case, because there had been a fraud. He cites the case of *Lord Gower v. Heath*, *Trin.* 1734, in *C. B.* (1), where in an action for *scandalum magnatum* the jury gave but a penny damages, and the court was unanimous that a new trial could not be granted for too small damages.

Serjeant *Skinner* with him. That in 1 *Mod.* 232, and 2 *Mod.* 150, the court refused a new trial, even for excessive damages, because the jury are judges of the damages.

*Abney* with him. That a new trial was never granted, where upon the evidence given, there was a ground for giving a verdict for the other party; nor where the action is upon a tort, and the demand not ascertained between the parties. That in the case of *Lord Townsend and Hughes*, as in 2 *Mod.* 152, *Scroggs*, J. says, That if the jury had given a scandalous verdict for plaintiff, as a penny damages, he could not have a new trial to increase them.

Lord *Hardwicke*, C. J. At the trial there was considerable evidence given on both sides, as to the probable cause of prosecuting, and if the verdict had been found for the defendant, I could not have said it was a verdict against evidence; there has been no case cited, where a new trial has been granted for smallness of damages in an action of this kind; but it has been said, That upon the reason of new trials for excessive damages, the court ought to go a step farther: but I believe every one knows, that it has been taken to be an established distinction, that a new trial may be granted for excessive damages, but may not for small damages; and there is this reason for the difference; because the penalty upon jurors in an attaint is so high, that in an attaint it was difficult to succeed; and for that reason the proceeding by a new trial was introduced; now an attaint will lie for excessive damages, but not for small damages, for the verdict in that case being given in favour of the party, the law would not suffer him to complain of it. It is true, that in the cases of *Woodford* and *Eades*, and of *Parr* and *Nibblet*, [8 *Mod.* 196, *Parr v. Purbeck*, 213, *S. C.*] the court did in some measure depart from this distinction; but that I think was right enough, because the actions in those cases were upon

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(1) *Bar.* 332. *Cooks. R.* 104. *Pr. Reg.* 431. *S. C.*

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upon plain contracts, of which the court could judge, and the finding less damages than appeared due upon the contracts, must *have been a mistake of the jury. But the present action is merely for a tort, and sounds merely in damages; and if we should do it in this case, I do not see where we can stop. It is not for the court to put themselves in the stead of the jury by way of appeal; in torts the damages are uncertain always, and the language of the law is, that the jury are judges of damages. As to the damages which were proved at the trial, I do not see they will warrant the court to depart from the rule; there is the same sort of proof in most cases, as in actions of battery there is proof of money paid to the surgeon. Suppose the jury should be equally divided, six for the plaintiff and six for the defendant, and finding neither side could bring the other over, they should compromise the matter, and those for the defendant should offer to the others, If you will give but small damages, we will agree to find for the plaintiff; if this application should prevail in every such case, the verdict must be set aside; and possibly the jury may have no other way of compromising the damages, and that might be the case here. That case of *Lord Gower and Heath* is a very strong case in point; so I think there should be no new trial.

Page, J. There was a case of *Clark and Bobbit*, in the Common Pleas; it was presently after the revolution. A grant was from the crown, of the sole navigation of the river *T*, which the plaintiff demised to the defendant at £100 *per ann.* but there was no express covenant to pay the rent; and in an action of covenant, the breach was assigned in non-payment of two years rent, and the court held the words yielding and paying, made no covenant. See 2 *Mod.* 35; but the jury gave a verdict for the plaintiff, with only one shilling damages; yet upon a motion for a new trial, the whole court was of opinion, that a new trial could not be granted, because, they said, better a mischief than an inconvenience.

Lee, J. In the year-book of 6 *Edw. IV.* fol. 7, it is determined, that an attainr will not lie because the damages are small. As to granting new trials, the courts have made a difference sometimes between plaintiffs and defendants; as in hard actions, if the defendant have a verdict, the court will hear no reason for a new trial; *contra*, if a verdict had been for plaintiff. There is no instance of a new trial granted in a tort after an actual trial had. There was the case of *Hayward and Newton, Michaelmas, 6 Geo. II.* 1732 †, where, in an action for words, a new trial was moved for, because of small damages; but the court refused it; and Lord *Raymond* said, he had known it refused by Lord *Holt*. As to the damage proved, that would be a reason to grant a new trial whenever the jury find a less sum than is given in evidence; but in all matters sounding in wrong only, the jury are to take every circumstance of the whole evidence *into consideration in settling the damages. What I found myself upon, is, upon the rule the court has

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has observed, and the reason of the law in proceeding in attaints; and I am of opinion no new trial should be granted.

Court unanimous, not to grant a new trial(1).

(1) But see *Bar.* 448, 9, 455, 6, in which latter case it is said, that where a demand is certain, as on a promissory note, the court will set aside a verdict for too small damages, but not where the damages are uncertain; and it is observable that the cases referred to in *Str.* 940, 1081, [the present case the same] were of this latter description. See 2 *Tid.* 881. And see 2 *T. R.* 261.

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VALET *versus* TYLER.

At the first Sittings in Term in *Middlesex*.

QUANTUM *meruit* for the use and occupation of the plaintiff's shop and parlour; upon evidence the case was, that the defendant's wife hired this shop and parlour of the plaintiff; and half a year's rent being in arrear, the defendant promised to pay it. And it was objected, that there being a demise proved, the plaintiff ought to be nonsuit.

Lord *Hardwicke*, C. J. If a man bring an *indebitatus assumpsit* for the use of a house, and there be a demise proved, yet the plaintiff shall maintain his action, if there was an express promise to pay the arrears grown due; but if it were a *quantum meruit*, and there appears to have been a demise, the action cannot be maintained by reason of such promise. But in this case here is not sufficient evidence of such a demise, for it was a transaction by the wife, and no ratification of the husband appears, for the promise of payment is but a promise in consideration of the enjoyment. He agreed likewise, that if this woman was not his wife, that the subsequent promise to pay the debt of a stranger, as it would be then for the enjoyment, without any previous special request by the defendant, would not maintain this action, for he did not occupy the premises himself at all.

Verdict for plaintiff†.

Quantum meruit will not lie for the use of a house if there be a demise proved; but *indebitatus assumpsit* lies where there is an express promise to pay rent grown due, proved.

† But now by stat. 11 *Geo.* II. c. 19, s. 14, if in evidence on trial any parcel demise, or any agreement (not being by deed) whereon a certain rent was reserved, shall appear, plaintiff shall not therefore be nonsuited, but may make use thereof as evidence of the *quantum* of the damages to be recovered.

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The KING *versus* DAVIS.

[2 Str. 1050. S. C. but not so full.]

In the exercise of their jurisdiction over the appointment of constables, conferred on the sessions by statute 13 & 14 Geo. II. c. 12, the statute must be strictly pursued; thus, an order of sessions for the appointment of constables in *Chepstow*, "for a year or until others are chosen," instead of "until the lord holds his court," held bad.

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AN order of sessions for the county of *Monmouth* was in this manner, Whereas on complaint of *A.* and *B.* the two old constables of the town of *Chepstow*, that they have served the office for a year, and that four other persons had been returned to the leet, but the steward refused to appoint any new constables; therefore on due examination of the complaint upon oath, it is ordered that *A.* and *B.* be discharged, and *C.* and *D.* able and fit persons of the *town of *Chepstow* are thereby appointed constables to serve for a year ensuing, or until others are appointed; and that they do before some justice of the said county take the oath of office.

Taylor moved to quash this order upon four exceptions.

1st Exception, That there is no adjudication that the former constables had continued in their office for a year, but a complaint of the constables only.

2d Exception, That the persons appointed in their stead are not said to be inhabitants of the town of *Chepstow*.

3d Exception, That no particular justice is appointed for the new constables to take the oath of office before; to support which exception he cited *Allen*, 78, and 5 *Mod.* 131.

4th Exception, That the order is, for the new constables to continue for the year ensuing, or until others were appointed; which is not pursuing the statute.

The statute referred to is 13 & 14 *Car.* II. c. 12, s. 15, which says thus, If the officer shall continue above a year in his office; the justices of peace in their quarter sessions may discharge such officer, and may put another fit person in his place, until the lord of the manor shall hold a court.

Strange in support of the order says, That as the order is, that on examination upon oath, the constables be discharged, it must be taken by reasonable intendment, that they had served for a year, and were entitled to be discharged.

In answer to the 2d Exception, he says the order has pursued the very words of the statute, in describing the new constables to be fit persons of the town of *Chepstow*.

To the 3d Exception, That as the law allows the constable to qualify himself before any justice of peace, the order would have been bad if it had confined him to any one in particular.

To the 4th he admits, That if this is to be considered as an appointment under the power given by the statute, it ought to be strictly pursued; but *per Holt*, in the case of the village of *Chorley*, *Salk.* 175, the justices have an authority to appoint constables without the aid of the act, and therefore this appointment is good.

Lord

Lord *Hardwicke*, C. J. I do not think this order can be supported upon the general authority of the case in *Salk*. [175:] for in that case the justices had done no more than appointed a constable in a town where there was none before. It is going a good way to say they had such a power in that case; but this, particularly, appears to be an order under the authority of the act of parliament, and is not merely for the appointment of new constables, but likewise for the discharge of the old ones; so that supposing what is said in *Salk*. to be law, yet nothing is there said, that the sessions have a power of discharging constables other than by the statute; so that I think that the order is intended to be founded on the act of parliament, and is not to be maintained by any general authority. Then how is the act pursued? Why, they have discharged a person without adjudging that he ought to be discharged; for I think there should have been such an adjudication, like as there is in orders of settlement; but here it is only said it appeared on complaint; and then a judgment, without affirming that what so appeared was true. But if that were out of the case, the time they are appointed to continue for is not in pursuance of the act; for that directs they should be appointed only to continue till the lord holds his court; so that this is a special authority and can only be supported by the act, which the order not having pursued, I think must be quashed.

All the court agreed, That on the last exception the order be quashed (1).

(1) See 2 *Hawk. P. C. c. 10. s. 49. pa. 141, 7th edit.*

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The MAYOR and BURGESSES of WORKINGHAM, in BERKS, *versus* JOHNSON.

IN an action of debt upon a bye-law, a special case was made, viz. That there is a bye-law in this corporation to this effect, that every inhabitant who is chosen a burgess and refuses to serve, shall forfeit 40s. That the defendant being a secondary burgess was elected a capital burgess, and refused. That the corporation consists of a mayor, capital burgesses and secondary burgesses; and, for the defendant's refusal to be capital burgess, this action was brought.

If no penalty be annexed to the breach of a bye-law, no action.

Where a charter expresses that if the capital burgesses die they are to be chosen out of the secondary burgesses, and if they die, they are to be chosen out of

Lord

the inhabitants, a bye-law, annexing a forfeiture to the refusal of an inhabitant chosen a burgess to serve, cannot be enforced against a secondary burgess elected to be a capital burgess but who refused to serve; such bye-law being, indeed, good; yet construed to restrain the penalty to an inhabitant chosen to be a burgess refusing to serve.

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Lord *Hardwicke*, C. J. Here are two questions. 1st, Whether this bye-law be good, or void. 2dly, Whether this refusal of the defendant be within it. As to the 1st, Is it void with respect of its extent to the persons intended to be bound by it? or, with respect to the subject matter? And I think it will be void in neither respect; not in its extent, for it appears upon the charter, which is here set out, upon oyer prayed by the defendant, that the persons incorporated *are the inhabitants; and no distinction made between them and the burgesses; nor any mention of freemen or approved men, but in general, inhabitants; and they are considered throughout the whole charter, as the body to be governed. For, the charter directs they shall make bye-laws for the better government of the inhabitants: and as the capital burgesses die, new ones are to be chosen out of the secondary burgesses, and if they die, new ones to be chosen out of the inhabitants; therefore the corporation has power to make bye-laws to bind the inhabitants. Is the bye-law void then, in respect of the subject matter? and how does it affect the defendant? And this is a more difficult consideration? for, if the construction of the bye-law is, that the words, inhabitant chosen a burgess, mean, chosen a capital burgess, that would be a void bye-law; because, contrary to the charter, which directs only the secondary burgess to be chosen from among the inhabitants, like the case of *The Mayor of Oxford and Wildgrove*, 3 *Leo*. 293. But I think the construction must be, If any inhabitant chosen a secondary burgess, &c.; because the inhabitant, merely as such, could not be a capital burgess; and then the bye-law is good; but then the bye-law inflicts no penalty for a refusal of a capital burgess, and, therefore, I think judgment must be for defendant.

All the court unanimous, judgment for defendant.

WIGLEY and MORGAN.

See 2 *Str.* 322.

If in proceeding against an attorney the venue be laid elsewhere than in *Middlesex*, he may move to change it to that county.
Tamworth?

LACY moved to change the venue from *Surry* into *Middlesex*, because the defendant is an attorney of this court, and he cited *Salk.* 668: *Seaman and Ling*: 2 *Shower*, 176, *Thompson v. Sir Wm. Scroggs*; that it shall both for a barrister and an attorney, he cited also a case of *Hicks and Foot*, *Hil.* 5 *Geo.* I. where in the Common Pleas the venue was changed to *Middlesex* for a barrister, and the case of *Bishop and Burgess*, *Hil.* 5 *Geo.* II. where it was done in this court for an attorney.

Vaughan on the other side cited 1 *Shower*, 148, *Lacker and Harcourt*, where such a motion for an attorney was refused; the same case is in *Carthew*, 126.

Lord

Lord *Hardwicke*, C. J. When it was moved, thought barristers had the privilege, but not attornies; but he is absent when they now come to shew cause.

Lee, J. I have looked into this matter, and find no difference between barristers and attornies; and there is no case otherwise, but that in *Shower* and *Carthew*, but all the cases since are contrary. *The case of *Bishop* and *Burgess* was directly this case, and the court changed the venue; so that, I think, the venue should be changed.

Page and *Probyn*, J. J. of the same opinion upon the authorities cited. And a rule was made accordingly (1).

(1) See also *Say*. R. 133. But see 3 T. R. 573. acc. Sir *James Burrows* 4 *Burr.* 4027. where the point was fully considered, and it was decided that an attorney may change the venue when plaintiff but not when defendant. has subjoined to his report abovementioned a summary of the cases upon the point.

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READ and MATTEUR.

TROVER against *Christopher Matteur*; defendant pleads in abatement, that he is called *John Mether*, and by the same name and surname was always known and called, *absque hoc*, that he is named by that name and surname of *Christopher Matteur*, or by the same name or surname was never known or called; to which plea plaintiff demurred.

Serjeant *Hayward*, for plaintiff, objects, 1st. That this is a double plea, because here are two matters put in issue, viz. Whether his christian name be *John*, and whether his surname be *Mether*. 2dly, If the plea is not double, then he submits that there is no variance in the surname, for both sound the same. And where the variance is in the christian name, the defendant ought to set out the place where he was baptised, and aver that he was baptised by such name, which is not averred in this plea, and therefore plea is bad.

Kyffin for defendant. The two names are but one description, and shewing the whole name to be mistaken, is but one fact put in issue. As to the want of the averment objected; this plea is right according to the case of *Warden* and *Holman*, 1 *Salk.* 6, [2 *Ld. Raym.* 1015. S. C.] and the precedents are so too, as 1 *Lutw.* 10. *Thompson's Entries*, fo. 1. pl. 6.

Lord *Hardwicke*, C. J. I think the plea is well enough, and not double. It is an uncommon thing for plaintiff to mistake both the names of defendant, and therefore there may not be many precedents of such a plea, but when such a mistake is made, I do not see how the defendant can plead otherwise: and as the defendant is

Where both baptismal and surname of the defendant are mistaken he may plead that he is called by his proper name, and surname; and held both one name and not a double plea: and it is not necessary that the plaintiff should in such a case aver that he was baptised by another name than that by which he was sued.

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in a plea in abatement to give the plaintiff a better writ, how could he do so in this case without shewing what his real name is. As to the other objection, I think there is nothing in that neither. The precedents and authorities are otherwise; so *Rastall's Entries*, fo. 296. tit. *Error*, There are two assignments for misnomer in the christian name, without averring that defendant was baptised by the right name, but only as the averment is here; so likewise in *Herne's Pleader*, fo. 9. a plea in abatement in the same manner, and the case in *Salk.* 6. is strong in point, and as it is reported in 6 *Mod.* *116. It is said, a defendant may plead such a mistake in his præ-nomen, though he were never baptised; and if that were the case, how could it be pleaded in any manner but this, therefore I think the bill must abate.

Lee, J. The defendant to be sure may, if he will, plead in abatement that he was baptised by another name; and if he should, there must be a venue laid as in *Skinner*; but it appears from the precedents and authorities that it is not necessary to plead so. Nor is this a double plea, for both make but one name.

Judgment that the bill be abated (1).

(1) See also *Bac. Abr. Misnomer*, F. 1 *Chit. Pl.* 447.

COCK and RATCLIFFE.

Where to an action upon a promissory note it was pleaded that was corruptly agreed, &c. the plaintiff may reply that the security was given for a just debt, and traverse that it was agreed *modo et forma* as the defendant pleads.

CASE against the defendant upon a promissory note made to plaintiff's testator. Defendant pleads in bar, That it was corruptly agreed between them that the testator should be paid in hand 10s. upon giving the note, which exceeds the rate of £5 per cent. and therefore insists that the note is void. Plaintiff replies, That the note was given for a just debt, without this, that it was agreed *modo et forma* as the defendant pleads; to which replication defendant demurs, and shews for cause, that the replication does not traverse the corrupt agreement.

Benny for defendant. *Serjeant Bootle* for plaintiff.

Lord Hardwicke, C. J. This is a good replication, and is a fairer way of pleading than to say ["that without this that"] it was corruptly agreed, because that is but the consequence of law upon the facts as they shall appear, though I agree it is more usual to plead in that manner. The old way was to traverse all the circumstances of the agreement, and, if that were good, this must be so too.

Page, J. At the trial, no evidence is given of the corruptness, but the facts themselves.

Judgment for the plaintiff (2).

MITCHELL

(2) *Com. Dig. Pleader*, (2 *W.* 23.) 1 *Wms. Saund.* 103 b. n. 3. 1 *Chit. Pl.* 4 *Wils.* 352. 2 *Doug.* 96. 2 *T. R.* 439. 552.

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MITCHELL *versus* PATE.

DEFENDANT was superseded at the plaintiff's suit, for want of plaintiff's proceeding to judgment in three terms, but being in prison at the suit of another person, he still continued in custody, *after which plaintiff proceeded to judgment, and charged him in execution with a *Ca. Sa.* and this being after a *supersedeas*, defendant applied to be discharged out of custody.

But was refused, for *per* Lord Hardwicke, C. J. If the defendant had been at large after the *supersedeas*, he not having had a *supersedeas* for want of being charged in execution; but only for plaintiff's not proceeding to judgment; plaintiff might have then proceeded to judgment, and have taken him in execution (1).

Where the defendant a prisoner shall have been superseded for want of proceeding to judgment in due time, but remains in custody at the suit of another person, the plaintiff in the action in which he had been superseded may charge him in execution.

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(1) R. T. 2 Geo. I. sect. 1. (c) K. B. and *Brown*, in the Exchequer, M. 27
1 T. R. 591, n. (a). 7 East R. 332. Geo. III. 1 Tid. 434. S. P.
Bar. 376. *Cooke's R.* 156. S. C. *Daries*

MOORE *versus* PAINE.

WRIT of error upon a judgment by default in the Common Pleas, in an action on the case upon a promissory note.

Clayton for plaintiff in error. 1st Exception, That the declaration is upon the statute, and yet sets out a note within the statute, for it is only a note payable to plaintiff and not to his order.

(Lord Hardwicke, C. J. That has been over-ruled often.) (2)

2d Exception, That no venue is laid in this case where the promise was made; to support which exception he cited *Chapman and Fothergill*, 2 Lev. 227. *Knighton and Moreton*, 3 Lev. 311, and *Auger and Brower*, 1 Ventris, 340.

Lord Hardwicke, C. J. That the statute of *Jeofails* of *Charles* helps this defect after a verdict, and the statute for amendment of the law extends the statute of *Jeofails* to judgments upon writs of enquiry.

Serjeant *Parker* for defendant in error, as to this exception, says, That the Common Pleas, upon consideration that the jury by the statute for amendment of the law is to come *de corpore com'*, and not *de vicineto*, have held this to be no defect upon a general demurrer.

3d Exception, That the award of the writ of enquiry is to enquire by the oaths of honest men, not saying twelve.

Parker,

A promissory note payable to the plaintiff, omitting "to his order," held good.

(2) Acc. 2 Ld. Raym. 1545. 6 T. R. 123. *Bar. Bayl.* 16. *Chitty on Bills*, 344.

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*Parker*, in answer, cites *Cro. Eliz.* 677, where was the same (1) omission, and held well.  
Judgment affirmed.

(1) The error assigned in the case said" was stated in the writ, without cited, was, for that "the city afore- any previous mention of a city.

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## \* HUMPHREYS versus CHURCHMAN.

Where by one part of a replication matter that goes to the whole action is put in issue, and then the replication goes on to reply *de injuria*, it is bad for duplicity, and not for being immaterial or departure; and it is ground of special demurrer.

Where the plea alleges a certain act to have been a consequence of another act, and the replication traverses it as being previous to that act, the replication not being *ad idem*, is bad on demurrer.

**TRESPASS** for breaking and entering the plaintiff's stable, and cutting asunder a beam, and throwing down the tiles off the roof. Defendant pleads Not guilty as to the force; and as to the residue of the trespass he justifies as servant to Sir *H. G.* and pleads that Sir *H. G.* was seised of a wall in his demesne as of fee; and because the beam was placed in the wall of the said Sir *H. G.* without his consent, the defendant as his servant, in order to remove the nuisance, did enter the stable, and cut the beam as near to the wall as he could, doing as little damage as he could, and thereby the tiles were thrown down. Plaintiff replies, and traverses that the wall is Sir *H. G.*'s, whereupon issue is taken, and he goes on *protestando* that the wall is not his; he says that the defendant of his own wrong did throw down the tiles for the cutting the beam as aforesaid. Defendant rejoins, that the wall is *H. G.*'s freehold, and as to the rest of the replication, he demurs, and shews for cause that the replication is a departure and immaterial. And plaintiff joins in demurrer.

This was argued last term by Serjeant *Chapple* for defendant, and Mr. *Agar* for plaintiff, and again this term by Serjeant *Wright* for defendant, and Serjeant *Parker* for plaintiff.

For defendant it was argued, That this replication is bad; for when plaintiff had traversed Sir *H. G.*'s seisin, that went to the whole trespass, and yet he then traverses the particular which is bad; for a man shall not plead two pleas which go to the whole. 1 *Salk.* 218. *Combe* and *Talbot*. The replication is likewise ill, and the traverse not well taken, for it does not pursue the defendant's plea either in words or sense; for the defendant's plea is, that he cut the beam, and thereby necessarily broke the tiles; and plaintiff traverses that he threw down the tiles for the cutting asunder the beam; which is making the breaking the tiles to be previous to the cutting the beam, whereas in defendant's plea it is a consequence thereof, and therefore the traverse does not deny what was alleged by defendant. That according to *Yelv.* 151. *Bedell* and *Lull*, [*Cro. Jac.* 221. 1 *Brownl.* 144. S. C.] the traverse ought to pursue the very words of the plea traversed, but, however, to be sure,

sure, it cannot depart from it in sense, because it must be a direct denial.

For plaintiff it was answered, and admitted that the rule of traversing is so, where it relates to the same matter, but not where it relates \*to different matter. That if the replication is bad for duplicity, there should have been a special demurrer even at common law. That the party may take one traverse as to one part, and another traverse as to another part, and it is not duplicity. 1 *Saund.* 336, 7. 2 *Saund.* 48, 51.

Lord *Hardwicke*, C. J. You need not cite cases for that.

For defendant it was replied, That this is not insisted on as double pleading, but as bad and unprecedented, and a traverse of what is immaterial and not insisted on in the plea, and therefore cause of demurrer is sufficiently assigned.

Lord *Hardwicke*, C. J. A plaintiff may no more reply two matters, one whereof goes to the whole, than a defendant may plead them; indeed if the defendant pleads an entire qualification, and the plaintiff has several excuses which he cannot plead entire, he may plead them severally, but if he has one matter which goes to the whole, he must plead it entire and rely upon it. Suppose in this case the defendant had taken issue on both parts of the replication; and there had been a verdict for the plaintiff on the first part, that it was not the defendant's freehold, and on the second part a verdict for defendant; the defendant notwithstanding could never have judgment; for, the finding it not his freehold would have cut up his whole defence, and that shews that the first traverse went to the whole. This is not, properly, a departure, for that is, when the defendant in his plea insists upon one matter, and then in his rejoinder he insists on a different matter; but here the party is in the same plea, in one part of it, insisting on what he does not in another part; therefore, it rather seems to me to be duplicity, and, if so, it should have been shewn for cause of demurrer, and therefore cannot now be taken advantage of. But, however, the traverse is not to my satisfaction at all; for the plea alledges the breaking the tiles to have been in consequence of cutting the beam, and the replication traverses its being previous, which is not *ad idem*; if the rule in *Yelv.* is not too strict, yet, certainly, the traverse must be the same in effect and substance, which it is not here by any means; so I think, the replication is ill in that respect, and would be so in the other, if that had been sufficiently assigned for cause of demurrer.

*Page*, J. To be sure the replication must be double, for there can be but one plea that goes to the whole.

*Lee*, J. In 3 *Lev.* 243, *Adney* and *Vernon*, the plaintiff's reply was agreed to be ill for a double traverse, and this I think amounts to the same; for, if the seisin of the wall were found against the defendant, it would make an end of his whole defence, but that should \*be assigned for cause. I do not think it is necessary that the traverse should follow the words of the plea exactly,

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though there have been cases, where the replication in following the words, where they were impertinent, has been held good.

Judgment for defendant (1).

(1) See *Crogate's case*, 8 Rep. 67. the defendant, or in another, the plain-  
*Willes*, 99, 202. 1 *Bos. & Pul.* 76. 7 T. tiff cannot put that in issue and also  
R. 654. They are cases in point to to reply *de injuria*, because that puts  
shew, that where a plea sets up a title in other facts in issue.

### The KING *versus* BAYLIS and REYNOLDS.

Appearing in the high road with the face blacked, or being disguised, is an offence within the 9 Geo. I. c. 22; for the several facts there enumerated are not to be taken as being parts of the same offence, but each of them a several offence.

THE defendants are indicted on the Black act, 9 G. I. c. 22. perpetuated by *stat. 31 Geo. II. c. 42.* the words whereof are these, That if any person or persons being armed with swords, fire arms, or other offensive weapons, and having his or their faces blacked, or being otherwise disguised, shall appear in any forest, &c. or in any high road, &c. every person so offending, being thereof lawfully convicted, shall be adjudged guilty of felony, and shall suffer death as in cases of felony without benefit of clergy; and hereupon they were this term tried at the bar by a jury of the county of *Middlesex*; for there is a clause in that act, *Sect. 14.* that for the better and more impartial trial of any offences committed against that act, every such offence may be tried in any county in *England*, in such manner as if the fact had been therein committed.

The indictment was, that the defendants since *June 1, 1723. viz. 20th of September 8 G. II.* at *Ledbury* in the county of *Hereford*, being armed with offensive weapons, and having their faces blacked, and being disguised, did feloniously appear in the high road there, against the form of the statute and against the King's peace.

The evidence was, that there was a great number of rioters assembled with intent to cut down some turnpikes set up in that county, and the prisoners were at the head of them, with their faces blacked so as it could not be known who they were, having on womens gowns, caps, and straw hats, and each an axe in his hand; and they, advancing foremost, were taken by constables, then assembled by the justices of peace; and after they were taken and confined, the rest of the rioters did cut down the turnpikes. After the evidence was gone through, the Chief Justice summed it up and directed the jury thus:

Lord *Hardwicke*, C. J. The several facts mentioned in this act are not to be taken as being parts of the same offence, but are every of them several offences; and this is a distinct separate crime from the rest; it is a single crime, and is for appearing in the high road with

with faces blacked, and being otherwise disguised; all the other matters proved, are but as circumstances, but were properly enough given in evidence, in order to shew the nature of the fact; therefore, if, upon the evidence, you believe, that the prisoners did appear in the high road with their faces blacked, that is sufficient within the act; or, that they were otherwise disguised, you are to find them guilty. The jury, immediately, without going out of the court, agreed, and found the defendants both guilty. And then *Masterman*, having indorsed the verdict upon the indictment; said, Gentlemen of the jury, hearken to your verdict as the court hath recorded it, You say, &c.

Then, a rule was made to bring them up at another day to receive sentence; when, being brought up, the Attorney General came into court, and prayed that sentence might pass upon them; and the prisoners being bid to hold up their hands, were severally asked what they could say, why the court should not proceed to give judgment, and to award execution against them. And then, Mr. Justice *Page*, the senior Judge below the Ch. Justice, pronounced this sentence; That you go from hence to the place from whence you came, thence to the place of execution, where you shall be severally hanged up by the neck until you are dead, and the Lord have mercy upon your souls.

They were ordered for execution at *Tyburn* (1).

(1) The Lord Chief Justice is made to omit that the "appearing armed," being armed; and the indictment was also essential to conviction; see the stat. 9 Geo. I. c. 22, where the having the face blacked, or being otherwise disguised, is conjoined with the always charges that fact. See the precedents, 82, C. C. C. 8th edit.

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### SHARP *versus* LOWTHER.

**PROHIBITION** to the Ecclesiastical court in a suit for tithes upon a suggestion, and plea in that court of a *modus*. The plaintiff declares, that he is an occupier of an ancient tenement in the parish of *B*, and that within the parish aforesaid, there has been a custom for all the tenants and occupiers of the said tenements yearly to pay 5s. and to perform certain services to the parson, in lieu and satisfaction of all tithes of corn and hay; which said *modus* the parson of said parish hath always accepted; defendant traversed the custom as laid in the declaration, and thereupon the parties went to issue; and a verdict was given for plaintiff. And now

*Fenwicke* moves in arrest of judgment, and objects, that this is a bad *modus*, being alledged to be warranted by a custom, whereas a custom is local and extends over some place; whereas this is laid to extend to the occupiers of such a tenement, and therefore if it were good it should be laid as a prescription; and to support his objection he cites 1 *Lutw.*, 126, *Nicholson* and

*Smith.*

Where in prohibition a *modus* is sufficiently found, the having stated it in the declaration as a custom for all tenants of a certain tenement, to pay it instead of tithes, will be sufficient, and no consultation can go.

In prohibition the defendant is considered as an actor suing for a consultation, and therefore a custom stated in the declaration need not be strictly proved as laid.



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*Smith. Cro. Car.* \*418, *Baker and Brereman*. 1 *Vent.* 97, *Polu and Henstock*. 2 *Lutw.* 1317, *Beresford and Bacon. Bro. Custom*, pl. 51. *Popham*, 201, *Jenkin and Vivian*.

*Bootle* for plaintiff, took the diversity in *Gateward's case*, 6 Co. 60. *b.* between a charge upon another's lands and a discharge in his own land, and that, therefore, a custom that every inhabitant has paid a *modus* in discharge of tithes is good. He cited also *Hob.* 118. *Dyer*, 349. 1 *Vent.* 3. *Yelv.* 55. *Hob.* 300. and 85.

*Lord Hardwicke*, C. J. The question is, Whether here be any *modus* sufficiently and substantially found; for if there be, now, after a verdict, no consultation can go. The objection is, that though the subject matter is a proper *modus*, yet the manner of laying it is defective, being laid by way of custom; for they say a custom extends over some place or vill (1), and that it is a prescription which extends only to particular persons; and there are, I allow, many cases to warrant that, but they are not applicable in this case; and the difference laid down by Mr. *Bootle*, as to the pleading a thing as a charge upon another, or in discharge of one's self, is very material. It is admitted that a custom may be alledged for a particular tenant, where the necessity of the case requires it; as in case a copyholder claims a right of common out of the manor, he must lay a prescription in the lord; but, where he claims common in the waste of the lord, he having strictly no inheritance in his lands, but only tenant at will, and for that a prescription must always be had by way of *que estate*, which he cannot alledge, not being tenant in fee; for in strictness the fee-simple is in the lord: therefore the law permits him to alledge it as a custom in the occupiers of such a piece of land, &c. and that case seems to be agreeable to this; for the plaintiff, here, could not prescribe that the owners of the inheritance, and all those whose estates, &c. have been always discharged of tithes; because, here, is no discharge claimed, but a satisfaction in lieu of tithes, therefore it must be alledged in this way. It is allowed, that if the declaration had laid that a *modus* had been paid him time out of mind, it had been good; which shews there is no necessity of laying a strict prescription. All the cases cited have been in instances where it is necessary to prescribe by a *que estate*, and in such cases a custom may not be alledged. So is the case in 1 *Lutw.* 126; so that in *Cro. Cha.* 418; and that in *Vent.* 97: and the reason is, because all prescriptions in a *que estate* suppose a grant made originally, and, therefore, it should be duly derived down to the claimant. But in this case it is impossible to shew a *que estate*; and therefore it is sufficient to lay there has been a *modus* time out of mind. If the word *modus* had not been used, but a declaration should only say, that time out of mind, the tenants and occupiers of such a tenement \*had paid, &c. or had used and accustomed

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(1) See *Toller on Tithes*, 148.

to pay, that would be good; and why should it differ because the sentence begins by saying, there is a custom to pay; especially as the conclusion, which says, that this custom and *modus* have been always inviolably preserved, shews it was intended to be claimed as a *modus*. However, this being a custom alledged in a suit in prohibition, it differs from other allegations of customs, for in those the custom must be proved exactly as it is laid; otherwise the party fails; but in prohibition the defendant is considered as an actor, suing for a consultation; and therefore as in this, if upon the whole it appears to the court that there is a *modus*, they cannot grant a consultation; and it has been determined, that if the jury should find what amounts to a *modus*, the court cannot award a consultation: therefore I think, taking this case in any light, the court cannot award a consultation.

*Page, J.* If *6d.* is insisted on, and but *4d.* found due; yet there shall not be a consultation, for the practice is, that in such cases the judge always certifies that they have proved a *modus*. Whenever you can shew that some other thing is due for which the parson has a remedy, a prohibition is granted; and for a *modus* he has a remedy not only at common law, but in the spiritual court also, if he will sue for that. Upon this verdict it must have been proved, that tithes were never paid in kind. I take it that a *modus* and a custom are the same, for a *modus* is the manner of paying, and the manner of paying for ever is a custom.

*Probyn, J.* The fact here is found as the plaintiff laid it, only the description of it as a custom, is mistaken.

*Lee, J.* It appears by the case in *Hob.* 85, that the bare use of the word "custom" in pleadings, will not bring them under the same regulation as the law has appointed for pleadings of customs, and in that case, too, a discharge laid by way of custom, was not considered as a custom, but as a prescription. If the fact here alledged is a sufficient discharge, sure the bare alledging it to be a custom will not vitiate; the force of the word "custom" in this case, is no more than it is customary; it is allowed that if this had been laid as a prescription it had been right; so then the question is, Whether what is here laid amounts to a sufficient description of discharge, and I think it does. In the cases cited for defendant, there was not sufficient to shew a prescription.

Court ordered the *postea* to be delivered to plaintiff(1).

(1) See 3 Burr. 1273. 7 T. R. 93. And see *Gwill.* 1328. *Toller on Tithes*, 184. And as to where a county may prescribe in *non decimando* generally, and where not, any more than a particular

person, see 2 Wms. *Samd.* 142, n. (2). And further as to what may be pleaded as to matter of custom, see 1 H. Bl. 393; see also *Willes*, 202, *cum notis*.

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COOPER *versus* LE BLANC.

In order to charge the indorser of a promissory note, it is not necessary to prove a demand made upon the maker.  
*Tamen quare.*

AT the sittings in term in *London*, the question was, Whether the indorser of a promissory note should be charged, though no demand could be proved to have been made upon the drawer; And,

Lord *Hardwicke*, C. J. held he should, and he said, that my Lord † *Holt* was of a contrary opinion, for he took the indorser to be only a warrantor, and that therefore a demand was necessary, and that the late Lord Chief Justice ‡ *Eyre* was of the same opinion; but he said that my Lord Chief Justice § *Pratt*, and Lord *King* and Lord *Raymond* were of opinion he might be charged, he|| himself was of the same opinion.

The defence was, that the note in question, and the indorsement are forged; and this they would prove by examining into the similitude of hands; for though the defendant had actually acknowledged this very indorsement to be his hand; yet it is alledged that arose from a mistake in the defendant, because there is another real note of the same date and contents, outstanding, But,

Lord *Hardwicke*, C. J. would not suffer it, and said, That possibly it might be done, if there had been no actual acknowledgment, or even as there has been such, you might possibly be allowed to give proof of an actual forgery; but it would be of most dangerous consequence now after such an acknowledgment. The indorser should have been cautious.

*Mich. 31 Geo. II. Heylyn v. Adamson by Lord Mansfield: That a demand must be proved upon acceptor of bill or drawer of note, in convenient time, and if not and he fails, no action against indorser. 2 Burr. Rep. 669. So contrary to Hardwicke. See Hamilton v. Mackrel, post (1).*

† *Salk.* 126, pl. 127, 133. *Ld. Raym.* 443. 12 *Mod.* 244.  
‡ *Stra.* 649.

§ *Stra.* 441, 515.  
|| *Atk.* Rep. 281, pl. 150.

(1) *Pa.* 322. The doctrine here, and in *Hamilton v. Mackrel*, *pa.* 322, *post*, laid down, has been repeatedly contradicted. A very elaborate judgment was given in *Heylyn v. Adamson*, 2 *Burr.* 669. See 2 *Doug.* 679. 7 *East. R.* 231. *Bar. Bayl.* 3, 223. *Chitty on Bills*, 372. In the principal case, and in that reported *pa.* 322, *post*, the distinction between the drawer of a bill, and the maker of a note, does not seem to be sufficiently recognized. These liabilities under similar circum-

stances are confounded; whereas the primary liability, in all events, of the acceptor of the bill, and that of the maker of the note are analogous. Not so that of the drawer of the bill, who is liable only in default of the acceptor; and therefore it is, that in action against the indorser of a bill, proof of the drawer's refusal to pay is not required. See the case last mentioned. It is clearly marked in *Heylyn v. Adamson*, 2 *Burr.* 669, mentioned above.

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KINASTON *versus* The MAYOR, ALDERMEN and ASSISTANTS of the TOWN of SHREWSBURY.*Vide* pa. 147. S. C. but not S. P.

A *Mandamus* issued to restore C. Kinaston to the office of an alderman of this corporation; to which the defendants made a special return, setting forth, That he had been amoved from his \* office, and setting forth the causes of his amotion; whereupon Kinaston came, according to the stat. 9 *Ann. c.* 20, and took five traverses to the return; and issue being joined upon each traverse, the jury found a general verdict for Kinaston upon two of the issues, and upon the three others a special verdict; but they found no damage or costs; and upon the special verdict † the court were of opinion for Kinaston; and, therefore, Serjeant Eyre, in behalf of the said Mr. Kinaston, moved for a writ of enquiry to be awarded, to enquire of the damages sustained by reason of the false return, because the jury have in their verdict omitted to enquire thereof. And he submits this case is within the reason of the case of ‡ *Herbert and Waters*, 1 *Salk.* 205. when in avowry by overseers of the poor upon the stat. 43 *Eliz. c.* 2. such an omission was supplied by writ of enquiry.

Where a jury trying traverses under stat. 9 *Ann. c.* 30, omits to find damages, the court will not direct a writ of inquiry for the purpose of assessing them.

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For the corporation it was argued, That a writ of enquiry shall not be awarded in this case, because the statute directs the proceedings to be as in an action on the case for a false return, and the damages to be recovered as in such an action; now, in such an action an affidavit would lie for excessive damages, and wherever an affidavit will lie, the damages may not be supplied by enquiry. And they cited *Cheney's case*, 10 *Rep.* 118. *Godbolt*, 270. *Skinner*, 595. 1 *Lev.* 255. *Sheaf and Culpepper*; *Sir T. Jones*, 128. 2 *Roll. Abr.* 721. *pl.* 12. 722. *pl.* 20. and the case of *Sir R. S. Cotton v. Davies*, where in such a proceeding as this is, no judgment was given for a peremptory *mandamus*, and yet judgment was for damages and costs. That case was *Michaelmas* 2 *G. I. Rot.* 21. *Stra.* 53.

In reply was cited *Lilley's Entries*, 248, *Strode and Palmer*; which is the only case upon this statute: and there a verdict was, That the party was duly elected, but no damages assessed, and a writ of error was brought; but it does not appear what became of it. They admit, that an attaint lies for excessive damages, where damages are the point of the issue, which is not the case: they say, that where an attaint lies there must be some action depending between

† See the case and resolution of the court, *The K. and Mayor of Shrewsbury, ante*, 147. *Carthew*, 362. *Skinner*, 595. *Comberbach*, 344, and 5 *Mod.* 118. See also *Valentine and Fawcett*, *Trin. ante*, 138.

‡ That case is likewise reported in

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between the parties, which is not the case, here, neither. That though *Cheney's* case is, as was cited, yet it must be considered, that at that time there was no setting aside verdicts, as has been practised since; but even that rule in *Cheney's* case has been since departed from, as in 5 *Mod.* 77. No attaint would lie here; for that lies upon a false verdict given in an issue between the parties, 1 *Inst.* 294. *b.* Now here is no issue joined as to damages. They said too, that if here a writ of enquiry is not proper, yet, as the damages here were not on the point in issue, therefore the court may assess them; as in debt, 2 *Saunders*, 107; and, as is done in trespass, upon judgment by default, *Yelv.* 151, *Goodwin* and *Welche*: and they cited, also, 3 *Leon.* 213, *Ognell's* case.

\*The court took until another day in term to consider of it, and then the opinion of the court was delivered by

Lord *Hardwicke*, C. J. We are of opinion, that the court cannot ward any writ of enquiry in this case; it depends entirely on the stat. 9 *Ann.* c. 20. [*Qu. s. 2?*] And the question is, What power the court have by that? The distinction laid down in *Cheney's* case is admitted, that were the jury are to enquire of damages as parcel of their charge, an attaint lies for excessive damages; and, therefore, such damages may not be supplied by writ of enquiry, because that would prevent the party's remedy by attaint; but that it may be supplied by enquiry where the jury enquires thereof, only as an inquest of office. But it was insisted the matters here in charge to the jury were the facts whereon the issues were joined; and that the damages were merely collateral; and likewise, that this being a proceeding upon the act of parliament, and not an action between parties; therefore no attaint would have lain for excessive damages. As to the damages being collateral, and not put in charge to the jury, we think they cannot be so considered; but that according to the words of *Cheney's* case, they are consequent and dependant upon the issue; and therefore, the jury are as part of their charge to enquire thereof. It is true, the issues are not joined upon the damages, but upon the facts of that return; but that will not make them to be collateral, no more than in an action upon the case, where though not guilty be pleaded, yet the damages are parcel of the issue. And whether an attaint lies upon this proceeding, the court give no opinion, nor need they in this case, because the court is here restrained from awarding a writ of enquiry by the words and construction of the stat. of *Q. Ann.*; for the traverses are, by the act, put in the room of actions upon the case for a false return, and the proceedings are strictly tied up to be as upon such an action: so that the question is only, Whether if any action had been brought for a false return, and a special verdict given, and no damages assessed, the court could have supplied that omission by a writ of enquiry? and it is clear they could not; and if they could not, then by plain consequence they may not in this case neither; and the court are to be governed by the authority of the statute, though it should be in a case

case where an attaint lies. The cases that have been upon the stat. of 17 C. II. c. 7, about distresses, are, all, in point, to this case. The words of the statute are, That if the verdict shall be given against the plaintiff in the replevin, then the jury returned to try the issue, shall enquire of the arrears of rent, and of the value of the goods distrained: now no attaint would lie upon either of those points; for they are both in nature of inquests of office, and are superadded by statute: and, yet, it has been always held upon this statute, that if \*omitted, it cannot be supplied by writ of enquiry; because the statute restrains it to be done by the same jury as tried the issue; and so was the case of *Sheaf* and *Culpepper* in *Lev.* [255] and other books, and so was a late case of *Tricket* and *Stevens*, in the Common Pleas. That statute of C. II. directs, That the jury returned to try the issue, shall enquire of the damages; this statute [9 *Ann.* c. 20. s. 2.] directs, that the damages shall be assessed in the same manner as an action for a false return, which is only by the same jury that tried the cause. The words of the clause, how the damages are to be recovered, must be taken distributively, as if it had been distinctly said, If the person hath a verdict, he shall recover damages as in an action, &c. and if judgment be given for him upon demurrer, or by *nil dicit*, &c. he shall recover damages as in an action, &c. What my Lord *Holt* says in Sir *James Harbert's* case, as reported in *Skinner*, 596, is very applicable to this case, for he distinguishes the case from the cases upon the statute of C. II.; because of the different penning in these acts; and, therefore, this case is to be distinguished from those upon the 43 *Eliz.* because of the different penning of the two acts. As to what was said that the court may assess damages, they being but matter of form, for the point of the proceeding is for the right of office; the court cannot take notice of that; for in an action for a false return, or in this proceeding, the plaintiff may insist on his whole damages: and the court cannot diminish them without his consent; and in the case cited in *Yelv.* 151, it is expressly said, that if the issue be tried by a jury they must assess the damages. Upon the whole we are, all, of opinion, that this is exactly like the cases upon the statute of C. II. and that the act of 9 *Ann.* is the rule we must go by: and by that act, we have not authority to award a writ of enquiry.

Then he bid the prosecutor's counsel consider what they could ask further for the prosecutor (1).

(1) See *post*, 377.

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versus  
The MAYOR,  
ALDERMEN,  
and ASSISTANTS  
of the Town of  
SHREWSBURY.

[ \*298 ]

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WILLIAMS *and* JONES *and* Others.2 *Stra.* 1049. [but not so full.]

One cannot  
justify a battery  
by barely shew-  
ing an arrest.

[ \*299 ]

**T**RESPASS for entering defendant's yard and breaking and entering his stable, and carrying away divers goods and chattels, viz. seven horses; and for an assault, battery and imprisonment of the plaintiff: defendants, as to breaking and entering the plaintiff's stable, justify; for that plaintiff detained in his stable seven horses or geldings of defendant *Jones*; and he, at a court of our Lord the King in his compters holden before *John Salter*, then sheriff of *London*, according to the custom of the city, levied a plaint for detaining the said goods; and afterwards the said sheriff commanded *Chamberlain*, another defendant, who was serjeant at mace, and a \*minister of the said court, to appraise the said goods, and to return them to the plaintiff; and the said serjeant at mace, and the defendant as his assistant, entered into the said yard, which was the only way to the said stable, and took the horses and delivered to defendant *Jones*. And as to the assault, battery and imprisonment they justify also; for that the defendant *Jones* sued out a *capias ad respondendum* against the plaintiff, out of the court of Common Pleas, directed to and delivered to the sheriffs of *London*; whereupon the sheriff issued a warrant to the defendant *Chamberlain*, one of the serjeants of mace, who by virtue thereof arrested the plaintiff, and detained him in custody for six hours, at the request of defendant *Jones*, who was plaintiff in the said writ, which is the same trespass and assault, &c. to which plea plaintiff demurred generally.

*Barnardiston*, for plaintiff last term, took several exceptions to the first part of the justification, viz.

1st Exception, For that the court holden before the sheriff, is not said to be according to the custom.

2d Exception, That the plaintiff to return seven horses or geldings, is too uncertain, *Allen*, 32. *Moore* and *Clipsam*.

3d Exception, That it does not appear that these horses, when taken, were within the jurisdiction of the sheriff's court, and precepts of inferior courts must be executed within the jurisdiction.

4th Exception, That plaintiff levied before *J. S.* sheriff of *London*, is bad, because the court will take notice there are two persons that are sheriffs. *Lambe* and *Wiseman*, *Job.* 70.

But all these exceptions were over-ruled, for *per*

Lord *Hardwicke*, C. J. The plea in these points is well enough. The levying the plaint according to the custom goes to the whole; for it is not said to be done at any particular court, but before *J. S.* in the Compter. As to the uncertainty of the goods taken, that might have been a good exception according to the case in *Allen* in an action of replevin; but it cannot be said to be so void a plaint,

a plaint, as that the officer cannot justify under it. As to the place where the goods are taken, the stable is laid to be in *London*, and the goods said to be taken in the said stable. As to *J. S.*'s being but one of the sheriffs, that is well enough, because he is said to be then sheriff, which is the same as then a sheriff, or one of the sheriffs, and it is alledged to be according to the custom; and the court is not necessary to be holden before both the sheriffs.

\* An exception was likewise taken to the justification of the assault and battery, viz. That a man may not justify a battery by virtue of an arrest by process, unless it had been by resistance, or in his defence, &c. which should have been set out; and the court doubted upon this exception, and ordered it to stand over until this term, when it was again argued.

*Strange* for plaintiff, in support of the exception, cited *Co. Entr.* 303. *b.* *Thompson's Entr.* 316. 2 *Lutw.* 925, *Patrick and Johnson* (1), That an arrest by *molliter manus* is not a justification of a battery. 1 *Sid.* 301. (2).

Serjeant *Chapple* for defendant, in support of the plea, cited *Salk.* 79, *Genner and Sparkes*, 1 *Saund.* 13. *Skinner*, 387, *King & Ur' v. Tebbart*: and 21 *H. VII. fo.* 29. The court took a further day to give their opinion, and then,

Lord *Hardwicke*, C. J. The question is, Whether a battery of the plaintiff can be justified by shewing an arrest by lawful process; and upon consideration of the cases, we are of opinion, that a battery cannot be justified by shewing an arrest barely; but that in order to make it good, something further should be shewn: as, that defendant gently laid his hands in order to arrest; and did arrest him; as in the case of *Patrick and Johnson*, 3 *Lev.* 403; though that way of pleading has been doubted of: or else, that the plaintiff made resistance, and was going to rescue himself, and by reason of that he beat him to take him. There is no case in all the books, that says, that a battery may be justified, barely by shewing an arrest; or, that it is repugnant to plead not guilty of the battery, and to justify the residue of the trespass by an arrest: the case in 2 *Lutw.* [925] 934. is not so, for the repugnancy there is, pleading not guilty to the assault, and justifying by an arrest; and that is right, because an arrest must necessarily be an assault, but is not necessarily a battery. The dispute in the case of *Patrick and Johnson* between the two reporters *Lutwyche* and *Levinz*, has occasioned the doubt that has been as to this sort of pleading; the question then was, whether an arrest by a *molliter manus* might be a justification of the battery; *Levinz* held it to be good pleading; *Lutwyche* thought it not so and the court inclined that way; but he allows there are precedents of pleading it by a *molliter manus*. But neither *Levinz* nor *Lutwyche* gave opinion, that the battery can be justified, merely by shewing an arrest, without

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and  
JONES and  
Others.

[ \*300 ]

(1) The original reference was 2 *Sid.* 46, *b.*

(2) 3 *Lev.* 403. S. C. but as to which see the animadversion, 2 *Lutw.* 929



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WILLIAMS  
and  
JONES and  
Others.

[ \*301 ]

without shewing a *molliter manus*, or a resistance, &c. As to what has been said, that every arrest admits a battery, because it cannot be without laying on of hands, and every laying on of hands is so; that is a mistake in the case of *Genner and Sparka*, which was cited to warrant that \*distinction, which it does not do; for the question there was, Whether there had been a rescue, and the court held that there had not, because there had been no arrest, for the officer had not touched the defendant; and to be sure in that case there was no arrest, for the party was neither touched nor confined. But it does not follow, that an arrest cannot be made without touching the person; for if a bailiff comes into a room, and tells the defendant he arrests him, and locks the door, that is an arrest, for he is in custody of the officer (1). But, supposing there was a laying on of hands in the present case, every laying on of hands is not a battery; for the party's intention must be considered: for people will sometimes by way of joke, or in friendship, clap a man on the back; and it would be ridiculous to say, that in every such case a man must justify, and may not plead not guilty. The case of *Wilson and Dodd*, 2 Roll. Abr. 546. is directly in point, that a *molliter manus* is not a battery. That case indeed favours *Lutwyche's* opinion, That a *molliter manus* is not a justification, because it does not admit a battery: therefore as the arrest is not a battery, this is not a sufficient justification.

*Per Cur'*, Judgment for plaintiff (2).

(1) Quoted 1 Tid. 218. See also 2 New R. 211, 212.

(2) Although the former authorities are various and contradictory, yet this it seems is now a leading case as to the point adjudged, namely, that a battery cannot be justified by barely shewing an arrest under legal process. It was once cited to shew that a bail could not plead *molliter manus imposuit* for the purpose of arrest, and that he did arrest. *Settley v. Foxall, Willes*, 688.

But this mode of pleading was adjudged to be good. *Id. ib.* and soon after its being decided, it was also cited to shew that a battery could not be justified by *molliter manus imposuit*; but Lord *Hardwicke* denied that it had been so decided. See the case *Tottage v. Petty*, post, 358. 1 Wms. Secund. 296, n. (1). *Selwyn's N. P. title Assault and Battery*, s. 3. 1 Ld. Raym. 229. See also *Willes*, 17, n. (b).

### The KING *versus* JENKIN.

2 Stra. 1050. 2 Sess. Cas. 229. pl. 161. Fol. 421. [1 Const. P. L. 474. 5th. edit. S. C.]

The authority given to justices out of sessions, in cases of bastardy, is by stat. 18 Eds. c. 3; and

which confers new power to convict or acquit therefore. An order made by such justices to acquit or discharge the person charged with being the putative father of a bastard child is bad.

LORD *Hardwicke*, C. J. An order of bastardy made by two justices of peace of the county of *Kent*, is removed hither by *certiorari*; the order is to this effect; Whereas complaint has been made

made to us by the owners of the parish of *Christ-Church*, That *M. B.* single woman was delivered of a bastard child within the said parish and hath charged *Jenkin* to be the reputed father thereof, and that the said bastard is now living, and is chargeable to the said parish: we therefore, &c. both dwelling next to the said parish, having taken and considered the examination, and heard upon oath the proofs alledged before us, do adjudge, that he is not the reputed father of the said bastard, and do acquit him of the same; the objection to this order is, That the justices have no such authority to give a judgment of discharge; and we are of opinion, that they have not such authority; their whole authority out of sessions, in cases of this nature, arises by the *stat. 18 Eliz. c. 3.* and the power given thereby is not a power of judicature, or to proceed by way of conviction, or to give judgment to convict or acquit, but merely to proceed by way of order, as in many other cases; and therefore the words of the statute are, That they shall take order, and accordingly it has been \*treated in this court as an authority to them to make orders, and not as giving them a jurisdiction to convict or acquit the parties; for the orders have been always made in *English*, and the evidence not required to be set forth, nor to set forth that the party was summoned; but looked upon to be sufficient to say, upon examination of the cause and circumstances in the words of the statute; and if it had been taken to be a proceeding to convict or acquit, they would have been all necessary: the question is then, what words in this statute warrant the justices to make such an order as this, which is neither for the relief of the parish, nor for the punishment of the party; the only two sorts of orders which the statute impowers them to make. If this matter had been examined at the sessions, as it may be originally by virtue of the *stat. 3 C. I. c. 4. s. 16.* it was said that they might have made an order to discharge him, which would be a good order and final; and that therefore by parity of reason the two justices may do the same; for said, that the words of the statute, which give sessions jurisdiction, are referring to the manner of proceeding by two justices; and this objection did at first appear to have some weight; for it is true it was determined in *Slater's case*, *Cro. Car.* 470, and *Pridgeon's case*, *Cro. Car.* 341, 350, that two justices, or a second sessions could not reverse an order of discharge made before at the sessions: so likewise in the case of *The King and Tenant*, 2 *Stra.* 716. 2 *R. Raym.* 1423. *Ses. Cas.* 273. *pl.* 213. *Michaelmas* 13 G. I. [S. C.] two justices made an order to charge the defendant, who appeared and was discharged; and an order made afterwards by two other justices, to charge him, was held void and quashed, because the defendant was absolutely discharged by the sessions; but none of these cases come up to this; for in all of them the order which was taken to be final was made by the sessions, which is the last resort in all these cases; and therefore it was a right resolution; but when their opinion was given, it should not be drawn over again by the same court,

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[\*302]

or

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or by two justices: it would be absurd, that when two justices have power by law to make original orders, and the sessions have power upon appeal from those orders, as well as by original application, that two justices might alter their orders, when those very orders of alteration may be reversed by the quarter sessions; and it is reasonable that the order of sessions should be conclusive. It would be inconvenient also, to hold, that two justices may make a final order; for the statute of *Eliz.* gives the parish no appeal, and the appeal for the party accused comes in only as he is to be bound over to the sessions; but if the two justices might make a final order of discharge, there is no method in the world for the parish to appeal, but would be concluded for ever, and never have an order for relief, if the party accused could find any two justices to make an order of discharge: an inconvenience was said to be on the other hand, that the party might be carried all round the country until some justice had \*refused to charge the parish; but if there be an inconvenience on both hands, the rule of law must take place; but it is no greater an inconvenience than in many other cases; as in all orders of settlement, likewise in suppressing ale-houses, for a complaint may be made to two other justices, who may suppress the ale-houses after a complaint to the two justices and an acquittal of the person complained against; and in all such cases if any oppression be committed, the party will have his remedy as for an abuse of legal authority; and there is hardly any legal authority but is liable to abuse; but that will not warrant us to maintain an authority which is not given to the justices by the act of parliament.

*Per Cur'.* The order must be quashed.

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### CROFTS *versus* WILKINS.

Verdict refused to be set aside on the ground of a material variance, where the issue was entered of Trinity, and the record of *nisi prius* was of Easter term.

**I**N debt upon bond dated in the year 1728, after verdict for the plaintiff upon *non est factum*, a motion was made to set aside the verdict for a variance between the issue delivered, which was entered of Trinity term, and the record of *Nisi prius*, which is of Easter term.

Lord Hardwicke, C. J. The only material question is, Whether this is such a variance, as that the party was deprived of any advantage at the trial; now, it might have been material, if they had made the memorandum of a subsequent term, so as to give themselves a cause of action, when at the bringing the action none was accrued; but as this case is, it is an advantage to the defendant, because the record puts the commencement of the action further back.

*Tot'*

*Tot' Cur'* agreed this is no material variance, and therefore *nil capit* (1).

(1) *Bar.* 464, 475, 6, 7. 2 *Str.* 1130. variance did not affect the merits; if *Say. R.* 154, 8. P. The principle of it had, it would have been fatal. *Bar.* these decisions seems to be, that the 475, 476.

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### The KING *versus* SHERMAN and IDLE & al'.

THE defendants were indicted for assaulting and beating *A.* and his wife; *Idle* pleaded *misnomer* of his surname in abatement, and for want of a replication by the King's coroner (2), judgment is entered, that he be dismissed and discharged from the premises specified in the said indictment, and that he depart without day; the rest of the defendants plead Not guilty; and at the trial of this issue, at the sittings in *Middlesex* after term, the proofs to charge the defendants were only *A.* and his wife; and the witnesses for defendants \*one woman, who is not indicted, that was there present, and the said *Idle*; and no objection was made to this evidence, though the prosecutor swore *Idle* was in the affray; but on the contrary, my Lord *Hardwicke*, C. J. in summing up, left it to the jury upon the credit of the witnesses, and said, here are two witnesses against two (3).

One indicted, but who for want of replication to a plea of *misnomer* is discharged, may be a witness for the other defendants.

[ \*304 ]

(2) There is little advantage comes by these pleas (*misnomer*, false addition, &c.) to the prisoner, upon these reasons, for the court may allow the exception, and direct a new bill according to what the prisoner says his true name is; for whosoever pleads *misnomer*, or false addition, must give himself the true name, and true addition by his plea, and that will be conclusive to him. 2 *Hale*, P. C. 238.

(3) See *ante*, 163, 8. P. recognized; also *Peak.* 153.

### BLIEDSTYN *versus* SEDGWICK.

Sittings in *London* after Term.

IN action upon a policy of insurance of a ship; the ship had been condemned by the court of Admiralty abroad in *Carolina*, and the acts of the condemnation given to the captain were since lost by bad weather at sea; and the question was, Whether the captain might give parol evidence of the reason that court went upon in condemning the ship?

Parol evidence not admitted of the purport of written evidence, without shewing it was lost.

Lord *Hardwicke*, C. J. would not suffer it to be done, for the rule is, That you cannot give evidence of written evidence that may be

X

produced,

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produced, without shewing that it is lost (1); but what was here lost, was only copy of the evidence, and if you thought it material, you should have the proceedings themselves here, and not give parol evidence of what they were (2).

(1) See 3 T. R. 151. 1 Str. 401. *Id.*  
 526.

(2) See 1 Str. 401, n. (1); also *Park*  
 c. 2, ss. 2, 4.

### CARY *versus* KING.

At the same Sittings.

Although it be not particularly laid in the declaration, the expence of salvage may be given in evidence in an action on the policy.

The plaintiff may give in evidence any loss immediately proceeding from the cause alleged.

[ \*305 ]

**ACTION** on a policy of insurance, for insuring goods on board the ship *A*. The plaintiff declares, that the ship sprung a leak and sunk in the river, whereby the goods were spoiled; and the evidence was, that many of the goods were spoiled, but some were saved; and the question was, Whether the plaintiff might give in evidence the expence of salvage, that not being particularly laid as a breach of the policy in the declaration.

Lord *Hardwicke*, C. J. I think they may give it in evidence; for the insurance is against all accidents. The accident laid in this declaration is, that the ship sunk in the river; it goes on and says, that by reason thereof the goods were spoiled, that is the only special damage laid; yet it is but the common case of a declaration that lays special damage, where the plaintiff may give evidence of any damage that is within his cause of action as laid; and though it was objected, that \*such a breach of the policy should be laid, as the insurer may have notice to defend it; it is so in this case, for they have laid the accident, which is sufficient notice, because it must necessarily follow, that some damage did happen (3).

(3) 2 *Marsh.* 692, 552, 730.

### COMBES *versus* COLE.

At the Sittings after Term in *Middlesex*.

Demise for a year, and so from year to year, is a lease for every particular year, and good for every year that lessee enters into. *Tamen Quare?*

**REPLEVIN** for taking some corn. Defendant avers for rent upon a demise from *Michaelmas* 1732, for a year, and so from year to year. Upon *non dimisit* pleaded, the parties went to issue; and the evidence proved the demise as laid; and Lord *Hardwicke*, C. J. ruled, upon the authority of *Salk.* 413, that this is a lease for every particular year, and good for every year; that lessee enters

ters into (1); and he directed the jury to find for the defendant, and that they should find the value of the rent in arrear, and of the wheat distrained; but† no damages.

† Q. For in the entry of *Archer's* ant, the jury gave damages, and there is judgment for damages.

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CONSIDERED  
VERDICT  
COLL.

(1) Upon this case Lord *Ellenborough*, C. J. thus observes; "There is another case in the same page of the book, *Bellasis v. Berebrick*, [S. C. 1 Ltw. 213], and another in the subsequent page, of *Legg v. Strudwick*, which over-rule that opinion: and these latter agree with common experience, that a demise for a year, and so on from year to year, must enure as a tenancy for at least two years; and so it is declared to be by Mr. Justice *Buller*, in *Birch v. Wright*, [1 T. R. 382], where he considers the cases in *Sulisteld*."

### SMITH *versus* WHISTLER.

At the Sittings in *London*.

THE record was put in, and the cause called on, and jury sworn, and then no body appeared on either side; therefore Lord *Hardwicke*, C. J. discharged the jury.

The jury will be discharged where on cause being called on neither party appears.

### NELSON *versus* Sir WOOLSTON DIXIE, Bart.

At the Sittings after Term in *London*.

ACTION for scandalous words which were thus laid to be said to the plaintiff's servant, where is that thief, your master, that confederate thief with *Barker*, who hath robbed me, I will hang him by God, damn me if I do not: the words proved at the trial were variant in this, that I will hang them both, instead of, I will hang him; and the question was, Whether this was a material variance. And *per*

Lord *Hardwicke*, C. J. It is, and the words laid are not proved. An action for words may either lay the particular words spoken, as in this case, or may set out the substance of the words; and the \*substance only be set out, as that the defendant charged the plaintiff with such or such a crime, &c. then it is sufficient to prove the substance of the words, and that was *Stayley's* case; and there are precedents of the sort in *Rustall's* entries, and the substance is laid in *Latin*; but where the very words are laid, those words must be proved as laid, though the rules are not now so

Where the plaintiff declared for words of felony, spoken of himself as confederate with another, and the declaration went on to state that the defendant said, "I will hang him," and the words proved were, "I will hang them both," held a fatal variance.

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strict as formerly; for if there should be a variation in the order of the words, as proved to be spoken from what is laid in the declaration; so it be agreeable in substance, it is sufficient; so likewise, if immaterial words are proved to be spoken, more than laid in the declaration: as I will prove it, &c. or if the words laid are, you are so and so, and the words proved should be, that he is so and so, those will not be such a variance, as that the plaintiff shall be nonsuit, for it is immaterial; but here the variance is material, and though indeed taking them *reddendo singula singulis*, as in pleading, or upon evidence where the substance only is laid; it might be taken to amount to a charge of hanging him; but here the words laid, and words proved, are so different, that if you were to recover in this action, it would be no bar to an action for the words proved (1).

Plaintiff nonsuit.

(1) It may be observed with the greatest deference, that the substantial part of this slander is the imputation of felony cast upon the plaintiff; the subsequent words upon which the nonsuit was directed, of themselves import no slander for which an action would lie. Such words therefore might be rejected as unessential to complete the grievance complained of. By a *nisi prius* decision, this view of the present case is in a great degree justified; for where the words laid were, "he is selling coals at a shilling a bushel

"pocket the money, and become a bankrupt to cheat his creditors," and the words, "become a bankrupt," were not proved, the variance was held fatal on the ground that the becoming a bankrupt was the means by which the creditors were to be cheated. See 2 *Esp. Ca. N. P.* 491; see also *Dyer*, 75. In libel, indeed, it might be held differently since there the cause of action is, or is presumed to be, set out in *hæc verba*. See 1 *Camp. N. P. C.* 350; see also *Maul. & Selw.* 287.

## TIREMAN *versus* HENWELL.

At the same Sittings.

A paper purporting to be a previous examination of the witness as to the matter in issue, taken before a magistrate, and signed by him, but not by the witness, was not admitted to be read in evidence, in order to discredit him.

**I**N an action upon a policy of insurance for the loss of a ship; a witness for the defendant proved a deviation; to discredit which witness, the plaintiff offered to give in evidence, an examination upon oath of this man, before the mayor of the town where they got on shore, wherein they said he swore otherwise; this examination was signed by the mayor, but not by the witness, nor any of those who were supposed to have made oath; but,

Lord *Hardwicke*, C. J. would not let it be read, for no examination shall be read, unless signed by the party (2).

(2) See 1 *East R.* 13, where it was held that the signatures of the magistrates at the foot of an examination must be proved. The signature of the party does not appear to have been requisite.

**FLUDIER**

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FLUDIER *versus* Sir THOMAS LOMBE.

At the same Sittings.

**A** *Mandamus* directed to Sir T. L. alderman of the ward of *Bassishaw* in *London*, to swear in the plaintiff *Fludier* to be common council man of that ward, he having been chosen into office on *St. Thomas's* day last. The defendant has returned, that he was not duly elected. Which return, the plaintiff, according to the late act of parliament (1) has traversed; and that is the issue now to be tried; and that depending on the question, Whether there were a majority of legal voters for the plaintiff, or a majority for *Reynolds*, who was his opponent, the plaintiff brought evidence to disqualify several of the votes which had been allowed in favour of *Reynolds*; and evidence was brought on the other side, to disqualify several of the plaintiff's votes; and, amongst the rest of the plaintiff's votes, objection was made to five, all for the same reason, viz. the fact was, that they were householders of houses above the value of £10 a year, and paid the parish and other rates in respect of their houses, but had let part of their houses to lodgers, at such rents as reduced their rents to be under £10 *per ann.* and the question was, Whether these were legal voters within the *stat.* 11 G. I. c. 18; and this was argued before the Ch. Justice at *Nisi prius*, by counsel on both sides, and then he gave his opinion as follows.

Where persons were householders of houses above the value of 10*l.* a year, and paid scot and lot, but had let part of their houses to lodgers, and thereby reduced their rents to be under 10*l.* *per ann.* held, that they were occupiers of houses, and entitled to vote under the *stat.* 11 Geo. I. c. 13, for regulating elections in *London*.

Lord *Hardwicke*, C. J. I am clearly of opinion, that these persons are well entitled to vote. The intention of the act of parliament appears to be to provide, that the voters be freemen, and of ability; of which ability it has appointed two evidences, viz. That they shall not receive alms, and that they shall live in a house of the value of £10 a year; and it was a reasonable thing that alms people should be excluded, and to admit persons whom landlords would trust with a house of £10 a year, as persons of proper abilities. It has been rightly said that this being law to take away people's franchises, should be strictly construed; and therefore it should not be construed to exclude any persons from voting, unless they appear to be excluded by the plain words and penning of the statute: now the statute declares in general, that the right of election belongs to freemen of the city, being householders and paying scot, and bearing lot when required. But this general rule has three sorts of restrictions put upon it by the act; 1st, That the houses of such householders be respectively of the true and yearly value of £10 a year at least. 2dly, That such householders be respectively the sole occupiers of such\*houses. 3dly, That they have actually been in possession respectively of a house of such value, in the ward wherein the election is made, by the

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space

(1) 9 Ann.-c. 20.



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space of 12 calendar months next before such election. In this case the only questions are, 1st, Whether these voters were householders of houses of the yearly value of £10. 2dly, Whether they were the sole occupiers of such houses. As to the 1st, to be sure the letting lodgings does not at all diminish the true yearly value of the house; and the act describes the qualification to be the yearly value, and not the rent; and the reason of that is, a person might hire a house of a very large yearly value, and pay a large fine upon coming into the house, and therefore a very low rent might be reserved, possibly under £10 a year; so that these voters are not disqualified in that respect. Why then does their having let lodgings, make them cease to be the sole occupiers within the meaning of the statute? and I must own, I have no notion that they do thereby cease to be so; for no man can be occupier of a house but either by living in one of his own, or in one that he hires; and a lodger was never considered by any one as an occupier of an house. It is not the common understanding of the word, neither the house, nor even any part of it can be properly said to be in the tenure or occupation of the lodger. And this construction will answer the intention of the act, in preventing the multiplying votes; for, though a lodger should pay rates, yet will he not have power to vote, not being to be deemed a householder or occupier. Lodgers are inmates, and surely the taking in inmates, does not make a man cease to be in the occupation of his house. There is in this act of parliament a clause, that where two persons, and no more, not being partners, shall have by the space aforesaid, severally inhabited in the same house, such two persons severally paying their scots, and bearing their respective lots, shall have votes; so as the house wherein they inhabit be of the real yearly value of £20, and that each person pay the rent of £10, at least for his respective part of such house (1). The votes now in question are not disqualified upon this clause neither; nor does the clause seem at all to relate to lodgers, but like the distinction in *Kelynge* as to burglary, it relates to houses that are divided between two inhabitants; and therefore the words of the act are, who severally inhabit the house; for a lodger cannot be said to be an inhabitant, but an inmate under the tenant. There is likewise another clause in this act, that in case two or more partners carry on a joint trade in any such house together, and shall have been householders of such house by such space as aforesaid, such partners shall, paying their scot and bearing their respective lots, have votes at such elections, so as such house wherein such partners carry on their trade, be of the real yearly value of as many respective sums of £10, a year computed together, as there are partners (2); which clause I take notice of in the last place, because of itself it is a plain proof against the defendant; \*for the cause plainly takes the case of such partners out of the clause relating to sole occupiers; why then suppose in a house of the

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(1) S. 11.

(2) S. 10.

the yearly value of £100 where two or three partners, and they should let the house in lodging, are they not fully entitled to vote? To be sure they are; for the clause, as to the sole occupiers, does not extend to them: and can the legislature be supposed to give them a right of voting in such a case, and yet prohibit a person who is sole occupier from voting, because he has lodgers? If it must be taken, that when a man has let lodgings, he is no longer the sole occupier, then if a man should have a house of £100 he would lose his right of voting if he took one lodger, though he paid him but £10 a year for his lodgings.

The Ch. Justice directed the jury to find for the plaintiff, and accordingly they found for plaintiff 12*d.* damages and 40*s.* costs.

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FLUDIER  
versus  
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WITHERINGTON *versus* BUCKLAND.

At the same Sittings.

**ACTION** upon the case; plaintiff declares, That in consideration that the plaintiff undertook to pay to the defendant what he should deserve for his labour, the defendant undertook to repair, alter and enlarge the said house, particularly a room in the said house; called the club-room; but he repaired it so ill, that the rain beat into the said room, whereby plaintiff lost the use of his room, for four or five months, which he lays to his damage. Upon *non assumpsit*, the evidence was, That the plaintiff's house having been damaged by fire, and he applying to one of the insurance offices to make it good, they employed the defendant to repair the damage of said house for a certain sum; and the plaintiff agreed with him likewise to make at the same time some alterations in the club-room.

Lord *Hardwicke*, C. J. You have not declared upon any general custom of the realm, that workmen are bound to do what they undertake in a workmanlike manner; nor as the declarations are against a smith for pricking a horse in shoeing him, but you have declared upon a special contract, and therefore you ought to prove the contract as laid; now the contract you have proved, was made with the assurance company, for the repair of the house; and if any contract was made by the plaintiff with the defendant, it was but for one room's alteration. Therefore you must call the plaintiff (1).

Plaintiff nonsuit.

Where the plaintiff declared upon a contract with the defendant for the repairing his house, and particularly for enlarging one room therein, and the breach assigned was, that he had repaired it ill; and the evidence was, that the defendant had been employed by an insurance office to make good the damage occasioned by fire for a certain sum, and that the plaintiff agreed with him likewise to make alterations in the room, held, that as the plaintiff had not declared upon any general custom to repair, &c. in a workmanlike manner, such variance from the contract laid, and that proved, was fatal.

(1) As to the general principle see 2 East R. 2. See also *Laves on Pleads.* 1 N. R. 351, acc. See 4 T. R. 687. ing, 101, *et seq.*

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WILKINSON *versus* SALTER and PERRY, Sheriffs of LONDON.

At the same Sittings.

Where a prisoner entrusted by the gaoler with the keys, is seen without the gaol, the sheriff becomes liable as for a voluntary escape; to an action of debt, for which, he cannot justify by alleging a recaption: *salter* had the escape been through negligence.

The sheriffs of London do not enter into their offices until the day they are sworn.

The testimony of the steward of the sheriff's court, inadmissible to prove that plaintiffs had been levied without producing them.

**A**CTION of debt for an escape, wherein plaintiff declares, That he recovered a judgment against one *H. C.* and by *ca. sa.* upon that judgment, he charged him in execution, in the custody of *Lambert* and *Westley*, the late sheriffs; who, at their going out of their office, on the 29th day of *September*, delivered the prisoner over to the present defendants, who have voluntarily permitted him to escape. The defendants have pleaded *nil debent*, and likewise that the said *H. C.* broke the gaol and made his escape, and that they pursued and retook him, and have him now in custody to answer the plaintiff. Plaintiff replies, that the defendant voluntarily permitted him to escape.

The defendants having pleaded *nil debent*, that put the plaintiff on the proof of his whole declaration; and, accordingly, a copy of the record of the judgment was first read; then an examined copy of the *ca. sa.* and the return that the sheriff had him in custody, and on the writ an indorsement that the prisoner and writ were delivered to the present sheriffs at the others going out of the office.

Then an objection was made by the defendant's counsel, That as the plaintiff had laid the particular day of the defendant's being turned over, and it not being under a *scilicet*, it was material to be proved. Now the day laid in the declaration is the 29th of *September*, but they said, the time when the old sheriffs quit their office, and turn over the prisoners, is on the 28th, and for that purpose they examined the steward of the sheriff's court, who confirmed it, and said the plaintiffs are levied on the 28th before the new sheriffs; but he had no plaintiffs ready to produce as evidence thereof; and *Serjeant Urlin*, the Deputy Recorder being in court, the Ch. Justice asked him as to this matter, who says, it is generally taken, that the new sheriffs are chargeable with the prisoners from the time of their being turned over, which is always upon the 28th of *September*, about seven in the evening.

However, the Ch. Justice said, they are not sworn at the *Exchequer* till the 29th, and he thought they did not enter in office until that time, and therefore over-ruled the objection; but said, if the defendants had a mind, he would save the point to them.

The evidence of the escape was, That the prisoner was seen at large out of the prison; that the plaintiff's attorney asked the gaoler \*if he was in custody, who told him he was gone out of the prison on an errand for the prisoners, and that the gaoler has made him turnkey of the prison, so that he has the keys of the prison in his custody, and lets people in and out of the prison.

Lord

Lord Hardwicke, C. J. Here is plain evidence of an escape: the only question is, Whether this is a voluntary, or a negligent escape. For if it is a negligent escape, the sheriff may justify by recaption; but if it be a voluntary escape, he may not justify; and this appears plainly to me to be a voluntary escape; for as he has been trusted with the keys of the prison, he may go out when he will; the only doubt that could possibly be raised in this case, would be the question which was in the case of *The King v. Huggins*, in the Exchequer. An information for an escape was exhibited against *Huggins*, for the escape of *Boyce* a smuggler, and defendant pleaded a recaption; and the Attorney General replied, a voluntary escape: and the evidence was, that the turnkey let him out of prison. And the court was of opinion, That the turnkey not being the warden's deputy, therefore his permission did not make it a voluntary, but only a negligent escape in the warden. But they held, that a permission by the warden's deputy would make a voluntary escape in the warden. So that, even that doubt is now cleared upon this evidence, because it appears that the gaoler himself appointed him to be turnkey; therefore you must find for the plaintiff for his debt. And, accordingly, they did find for plaintiff, and 12*d*. damages.

N. B. By the *stat.* 8 and 9 *W. III. c. 27*, If a gaoler refuses to shew his prisoner upon demand, it is evidence of an escape; and that no retaking or fresh pursuit shall be given in evidence, unless specially pleaded: nor such plea received, unless oath be made in writing, that the prisoner escaped without his knowledge or consent.

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WILKINSON  
versus  
SALTER and  
PERRY, Sheriff  
of London.

### GIBSON versus M'CARTY.

At the same Sittings.

ISSUE directed out of Chancery, to try whether some notes under the hand of the Lady *Margaret M'Carty* deceased, payable to the plaintiff's intestate, to the value of £1500, were the real notes of the said Lady, or were forged notes.

The plaintiff was admitted a pauper in Chancery, and the cause was brought now to trial as for a pauper, but without any admission of him as a pauper in this court; and therefore when the cause was called, the marshal informed the Ch. Justice of this matter, who said,

That he would not have it understood, that any admission *in formâ pauperis* in the court of Chancery, would be binding to the officers in this court; but that the party ought to petition, and

Although a plaintiff upon an issue directed out of Chancery, shall appear to have been regularly admitted to sue *in formâ pauperis* there, [\*312] he must also be regularly admitted to enable him to try such issue. And such admission be made during the trial.

The record of a conviction in a criminal matter, cannot be read as evidence in a civil suit.

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be admitted likewise in this court; but however, for the present, he directed the jury should be sworn and the cause go on, and that the plaintiff should get a petition ready, and he would admit him; which was done accordingly during the trial.

The present plaintiff was a few days ago convicted of forging a note under the said Lady Margaret M'Carty's hand, payable to himself; and plaintiff having read in evidence the deposition in Chancery, of a dead witness, to prove the Lady Margaret's acknowledgment of the notes in question to be her notes; and the same witness having likewise sworn to her acknowledgment of the note, for forging whereof the plaintiff was since convicted. Therefore,

Strange for defendant, offered to give the record of that conviction in evidence for two reasons; 1st, Because it goes to the credit of the witness's evidence, as to the acknowledgment of the notes in question. 2dly, Because there is at all times liberty to examine into the plaintiff's character.

Serjeant Parker, for plaintiff, opposes it, because it is the rule of evidence, that no record of a criminal action can be given in evidence in a civil suit, because such a conviction might have been upon the evidence of a party interested in the civil action.

Lord Hardwicke, C. J. This is a pretty tender thing, and the general rule is as my brother Parker mentions; and has been so strictly kept to, that in the case of the family of the *Hilliards*, upon a trial at bar, in a question of legitimacy; the court refused to admit a sentence of excommunication in the spiritual court, for fornication between the father and mother of the party, whose legitimacy was impeached, to be given in evidence (1); therefore I think you cannot give this conviction in evidence, but you may produce the paper for forgery whereof he was convicted, and shew the marks of forgery attending it; and give that in evidence, as to the credit of the witness; which was accordingly done (2).

(1) See *Mendez and Villa Real*, ante, 18.

(2) Upon this case Mr. Peake has fully observed; from the cases adduced by that gentleman, its autho-

rity, as a general position, seems unquestionable; and that upon the principle laid down by Serjeant Parker. *Peak. 44, et seq.* See 4 *East R.* 373. See however *Gillb. Law Ev.* 31.

## MICHAELMAS TERM,

10 Geo. II. 1736. B. R.

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PHILIP Lord HARDWICKE, Lord Chief Justice.

Sir FRANCIS PAGE, Knt.

Sir EDMUND PROBYN, Knt. } Justices.

WILLIAM LEE, Esq.

JOHN WILLES, Esq. Attorney-general.

DUDLEY RYDER, Esq. Solicitor-general.

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## WAKEFIELD'S CASE.

**TAYLOR** moves for an attachment against one *Wakefield*, for not attending to give evidence, being served with a *subpœna*. The ticket and *subpœna* were not sworn to have been served personally; but delivered to a servant at the witness's house, who carried it up to his master, and brought down word, that he had delivered it to his master, who said he would attend.

Lord *Hardwicke*, C. J. This way of proceeding by attachment is a new method(1); I do not know that it has been determined, that serving a *subpœna* on a servant, would be sufficient service to maintain an action; but however, to be sure, it is not a sufficient ground for an attachment.

*Lee*, J. And it has been solemnly determined, that you must not only have an affidavit of tendering the shilling, but likewise of a tender of reasonable charges, to ground an attachment.

Court refused his motion †.

Delivery of a *subpœna* to a servant, who said he had delivered it to his master, who declared he would attend, not sufficient to ground an attachment against the master.

On moving for an attachment for not obeying a *subpœna*, an affidavit as well of tendering the shilling, as of reasonable charges, is necessary.

The

† 2 *Stra.* 1054, S. P.

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(1) See *pa.* 180, *ante*, where the attachment was refused on other grounds. This case was cited *arguendo*, 9 *East* 478.

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The KING *versus* TURFOOT.

A writ of *excommunicato capiendo* in the conjunctive, i. e. for subtraction of tithes and other ecclesiastical duties, held good.

**M**ARSH moved to quash a writ of *excommunicato capiendo*, which recited the *significavit* to be of an excommunication, for not appearing to a libel in the ecclesiastical court, in a cause there for subtraction of tithes, and other ecclesiastical duties and emoluments, upon the authority of the case of *The King and Fowler*, in 1 *Salk.* 293(1), he inferring that in this case, as well as that, the writ was bad for uncertainty. But *per*

Lord *Hardwicke*, C. J. This has been determined to be no exception and the difference is, when the *significavit* is in the disjunctive, as in the case in *Salk. Sive aliorum jurium ecclesiasticorum*, for there it is uncertain and bad; because the court might have excommunicated upon the *alia jura*, which is not certain enough; and when the *significavit* is in the conjunctive, as this case is; because the excommunication appears to have been upon what is certainly alleged.

*Tot' Cur' accord'*, And would not quash the writ (2).

(1) See also 2 *Str.* 946, acc. S. P.

2 *Str.* 950. 2 *Kel.* 132. S. C. where

(2) It should seem that the uncertainty does not arise upon the *significavit* being with the disjunctive. See

the *significavit* was for slander or defamation; but the court said that was not uncertain as *conjecture* was.

## CONDEN and COULTER and Others.

Where the writ of enquiry was against two defendants, and the declaration against three, the court refused to set aside the writ for irregularity, but allowed the party to amend on payment of costs, and the record of the judgment by default held a warrant to amend by.

Matter of irregularity, carries costs.

**I**N trespass, the declaration was against three defendants, and the writ of enquiry recited it to be against two only: and it being moved to be set aside for irregularity,

Serjeant *Draper* shewed cause, that if the writ was wrong, in this case it is matter of error, and no advantage can be taken of it by motion: but

*Per Cur'*, As to its being error, possibly it is so; but to be sure it is a matter of irregularity, for it is a writ of enquiry taken out in a cause which is not depending; but however, if the plaintiff asks, to be sure it is amendable by the record. Then

*Draper* moved it might be amended, but objected to paying costs upon the amendment.

*Cur'*, This is a matter of irregularity, and therefore carries costs; indeed, where amendments are made upon a writ of error after verdict, &c. by virtue of the statutes of *Jeofails*, no costs are given, for the construction of those statutes is to give judgment for the party

party upon the writ of error, as if the amendment had been made (1): but this is not upon a writ of error, but within the common rule; therefore let plaintiff amend upon payment of costs (2).

(1) Cited 2 *Tid.* 724, 900, edit. 1812. See 2 *Str.* 1011. See also *Str.* 684. And a writ of inquiry may be amended by the record of the judgment by default, 4 *East R.* 173.

(2) Although matter of irregularity,

as above decided, carries costs, yet it is said, that on staying the proceedings in an action brought on defective grounds, the costs are in the discretion of the court. See 1 *Tid.* 517, ed. 1812; who, however, cites no authority.

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CONDEN  
and  
COULTER and  
Others,

### UMFREVILLE *versus* LOCK.

**D**ECLARATION delivered without pledges; and a special demurrer shewing that for cause. Afterwards the paper-book made up and delivered to the defendant, with pledges duly added to the declaration, and then the paper-book returned to the defendant without complaint, and the cause set down for argument, and stands for the next paper day; and now

The want of pledges to a declaration is a ground of special demurrer. [*Tamen quare?*]

*Taylor*, for defendant, moved, that the paper-book may be made agreeable to the declaration delivered; but

Court refused, for it is now too late, and the delivery of the paper-book, without taking notice of the alteration, is a waiver of the irregularity (3).

(3) Notwithstanding this decision, want of pledges would not be even the together with others which appear to be well founded on the stat. 4 *Ann.* T. R. 157, 8: *Bar.* 163: 2 *H. Bl.* 161: *s.* 16, *s.* 1, it seems, that at present the 1 *Chitty* on Pleading, 401.

### ANDREWS *versus* JERNEGAN.

2 *Stra.* 867. *Fitzgib.* 175, pl. 22. *Burnard.* B. R. 334. [S. C.] (4).

**U**PON a motion to set aside a *ca. sa.* for irregularity, a writ of error having been previously allowed.

A *ca. sa.* against the bail, issued subsequent to allowance of a writ of error, will be set aside with costs.

*Strange e con'*, That this *ca. sa.* was sued out, in order to warrant commencing an action against the bail upon the recognizance; and he admits that it was determined in *Sweetapple* and *Goodfellow*, that a *ca. sa.* to warrant a proceeding by *sci. fa.* against the bail, must be set aside, if subsequent to a writ of error; but prays that it may be without costs. But,

Court,

(4) Cited also 2 *East R.* 441.



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Court, There is no reason to excuse you costs, for it is your irregularity has obliged them to apply to the court (1).

(1) See 2 Str. 1186: 1 Wils. 16. S. C. 3 T. R. 390. But the writ of error does not prevent the plaintiff from proceeding by *scire facias* against the bail; or by action of debt on the judgment against the principal: nor after the return of *non est inventus* to a *capias ad satisfaciendum*, by *scire facias*, or by action of debt on the recognizance,

against the bail. In such cases, however, if it do not appear that the writ of error is brought for the mere purpose of delay, the courts will stay the proceedings upon terms pending the writ of error. 1 Tid. 525, 6. 2 East R. 459: and as to paying costs on irregularity generally, see 1 Tid. 517, edit. 1812.

### The KING and The INHABITANTS of HATFIELD.

In an indictment for not repairing a highway, it need not be described as a highway to be used in any particular manner.

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**I**NDICTMENT for not repairing the highway, which describes the way to be a certain common or the king's highway, called *A* leading from *B* to *C*, containing in length and in breadth

\**Dennison*, for defendants, moves in arrest of judgment, that this description of the highway is too uncertain, for it ought to show whether it is a footway, or a way for carts, or for horses, &c. and so are the precedents, as 2 *Saund.* 158: *Tremain*, 201, 205, 207. *The King* against *Warde* and *Lyme*, *Cro. Cha.* 266, and 1 *Salk.* 359, where judgment upon an indictment for not repairing *occidentalem partem communis pontis pedalis*, was reversed, because *pontis pedalis* does not signify a foot bridge, but a bridge a foot long, and therefore should have been *pontis pedestris*; whereas, if the description of it, as *communis pontis* had been sufficient, the court would have rejected the word *pedalis* as surplusage.

Court held the description in this judgment to be good.

Lord *Hardwicke*, C. J. The length and breadth of the way (2), and from whence and whither, are necessary to be ascertained in these indictments (3). But I do not remember any authority that holds it necessary to say, it is highway for this or that particular carriage, for if it is a common highway, it is a highway for all manner of things (4).

(2) But see *ante*, 106, n. (1).

(3) Also *The King v. Haddock*, *And.* 145: *The King v. Hammond*, 1 Str. 44. 10 Mod. 382, S. C. and *The King v. Parker*, there cited by *Parker*, C. J. Also see 2 *Wms. Saund.* 158 a, 158 b, n. (6). Also 1 *Hawk. P. C.* c. 76, s. 86.

(4) And see 2 *Wms. Saund.* 158 a, n. (8). Also 8 *East R.* 6, n. (2), where

the learned editor has subjoined a note of the same case from Mr. *Ford's MS.* But in *Alban v. Broenwall*, *Yelv.* 163, upon demurrer to a plea of a right of passage, the bar was adjudged ill, amongst other reasons, for this, that it was not shewn what manner of passage it was, whether on foot, or horse, or cartway; so that it was in the whole uncertain. *Id.*

The

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The KING *versus* TOMLYN and Others.

ON a motion for an information, *quo warranto*, against the defendants, who had been chosen jurats of the corporation of *Maidstone*, by a select number of inhabitants; whereas, the charter directs the choice to be by the inhabitants, which refers to a majority of the whole, it was objected against granting the information, that there has been a long usage to choose them in this manner. But

Court granted the information; for, *per Lord Hardwicke*, though according to the case of corporations in 4 Co. [77], where a charter directs the election to be by the mayor, jurats, and commonalty, the body may make a bye-law to vest the power of election in any select number; yet here, the question being, Whether there is such a bye-law or not? the court cannot determine that upon motion, but it must be tried; and therefore, in the case of *Brecknock* (1), though the special verdict found, that the defendant's election was according to a very long usage, yet not having found expressly that there was a bye-law for that purpose, judgment was given against the defendants; for no usage, how long soever, in case of a corporation by a charter, can support an election made otherwise than according to the records of the charter, unless the jury find there was a bye-law for that purpose; though, possibly it may be otherwise in case of a corporation by prescription.

If an election has been made agreeably to long usage, but contrary to the terms of the charter, and it do not appear that any bye-law exists to ground such election, an information *quo warranto* will be granted.

(1) 8 Mod. 201. 3 Bro. Par. Ca. 428. S. C. 2 Str. 782. S. G. but not S. P.

\*BOUNDS *versus* ALLEN.

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MOTION to set aside an outlawry, for that it is an action of debt by original in this court; whereas, such action lies not here by original.

Lord Hardwicke, C. J. I have seen good opinions, that an action of debt by original will lie in this court, though it is generally held otherwise (2); however, this makes not the outlawry void so as to be set aside for irregularity.

(2) 4 Inst. 76: Trye. 55, 77. 3 Comm. original lies in K. B. 1 Tid. 95, 96, 48. It is now settled, that debt by edit: 1812.

Although it may be doubtful [quæres] whether an action in debt by original will lie in K. B. yet an outlawry commenced and prosecuted in debt in that court, will not be set aside for irregularity.

SMITH

1736.

SMITH *versus* LANGLEY.

Before sentence in Ecclesiastical or Admiralty court, a prohibition may be granted upon a suggestion of a matter of fact not appearing on the face of the proceedings below, but after sentence it will not be granted upon the bare averment of a fact; yet the want of jurisdiction appearing upon the face of the libel, or of any part of their proceedings, is a sufficient ground for a prohibition after sentence.

ON a motion for a prohibition to the court of Admiralty, said, *per*

Lord *Hardwicke*, C. J. The rule of granting prohibition before or after sentence is this, That before sentence you may have a prohibition upon suggestion of a matter of fact, not appearing on the face of the proceedings below; but after sentence, you cannot overturn the proceedings by a bare averment of a fact; yet, if there be a want of jurisdiction appearing upon the face of the libel, or any part of their proceedings, that is sufficient ground for a prohibition after sentence, whether the cause be in an Ecclesiastical court or in the court of Admiralty.

SMITH *qui tam, versus* GIBSON.

*Ante*, 271. S. C.

On a contempt, *ex* prohibition, the damages recovered, are only from the time of the prohibition granted.

A recovery of damages in an action *ex* prohibition, is no answer to an action on the stat. 2 Hen. IV. c. 11, for double damages and 10*l*. for suing plaintiff in the Admiralty court.

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ACTION on the case upon the stat. 2 Hen. IV. c. 11, for suing the plaintiff in Admiralty court in a cause whereof that court has not jurisdiction; wherein plaintiff declares, &c. (see the substance of the declaration, *Trin.* 1736, p. 271). To which defendant pleaded in abatement, and upon judgment of *respondeas ouster*, he pleads in bar, that in *Hil.* term, 8 Geo. II. the plaintiff sued the defendant by bill in this court in a plea of trespass and contempt, for prosecuting a plea in the court of Admiralty after his Majesty's prohibition to the contrary first directed and delivered, which he laid to his damage £100. To which bill the defendant appeared and confessed the action, and prosecuting the plea after the prohibition delivered; and did acknowledge, that the plaintiff had sustained damages by reason of the premises in that behalf, unto two pence, besides costs: whereupon judgment was given, that the said plaintiff should recover against the said defendant his damages aforesaid, to the said two pence, by him the said defendant, in form aforesaid acknowledged, and also his costs, &c. all which proceedings in that suit are set out *verbatim* in the plea; and then the plea avers, that the plaintiff, the defendant, and the suit in the Admiralty mentioned in the record pleaded, and the present plaintiff, defendant, and suit, in the Admiralty, mentioned in the proceedings

ceedings in this action, are one and the same; and it avers further, that the two pence damages mentioned to be recovered in the said record were so recovered in full satisfaction of all damages sustained by the plaintiff by reason of the suit in the Admiralty, besides costs; and that the said judgment is in full force.

To which plea plaintiff has demurred; and shews for cause, That the conclusion of the plea is wrong, in not verifying the plea by the record of the judgment therein pleaded; but that matter was not mentioned at the bar, the plea being adjudged to be bad in substance.

The defendant pleaded not guilty likewise by leave of the court.

Serjeant *Boote*, for plaintiff, upon the demurrer. It is never settled that damages are to be recovered upon the attachment for proceeding *post prohibitionem*. *Cro. Cha.* 559, and 1 *Roll. Abr.* 557, pl. 24. *Facy and Lange*, 3 *Lev.* 360. *Heywood and Foster*, 2 *Inst.* 490, the damages recovered upon the prohibition can be no bar to an action upon the statute, for the first damages are for proceeding *post prohibitionem*; and the action upon the statute is for the damages suffered before the prohibition granted. In the case of *Leathes and Carlton*, *Michaelmas*, 2 *Geo.* I. plaintiff declared in prohibition, and judgment by default; and upon the writ of inquiry, the question was, Whether damages were to be given from the commencement of the suit in the court below, or only from the time of the prohibition delivered; and it was holden by Lord *Parker* and the whole court, that plaintiff should have damages only from the time of delivering the prohibition; therefore, the court will intend that the damages adjudged in this case were only from the time of the prohibition delivered: and for the same reason, it is not within the rule laid down in *Sparrie's* case, 5 *Co.* 61, That *nemo debet bis vexari pro una et eadem causa*, for these are not *una et eadem causa*. A recovery in an action of account for the same sum, is not pleadable in bar to an *indebitatus assumpsit*, because damages are recoverable in an action upon the case, but not in an action of account, *Moore*, 458.

*Barnardiston*. A recovery in one action is a bar to another action of the same nature for the same thing, 6 *Co.* 7, a. A recovery in an action of trespass on the case is a bar to an action of trover for the same goods, *Letchmere and Toplady*, 2 *Vent.* 169, and 1 *Showr*, 146. If a man recover in trespass at the common law, it shall bar him in a writ of ravishment of ward upon the stat. *et contra*, *Hob.* 94, 2 *Inst.* 200.

Lord *Hardwicke*, C. J. I cannot see how a recovery of damages in prohibition can be a bar to an action upon the statute for double damages, and the penalty of £10. I have always taken it, that the damages recovered upon the attachment, *sur prohibition*, were only from the time of the prohibition delivered. We must take it as if an original writ of prohibition had issued out of Chancery to the judge below, and the party had still gone on proceeding, which is a contempt; and for that contempt and the damages,

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the statute gives an action. The proceedings upon the attachment are for carrying on the suit below, *post prohibitionem*, which are the very words of the writ, and how can he upon such a suit recover damages incurred before the prohibition granted? There are several cases where a recovery in one action shall be a bar to another action of the same nature; but that is where the first recovery is a satisfaction for the very thing demanded by the second action; so in an action of trover, the plaintiff recovers damages for the thing, and it is as a sale of the thing to the defendant, which vests the property in him; and therefore, it is a bar to an action of trespass for the same thing. But that is not this case, for the present action is not for what was recovered upon the prohibition, but for a contempt, and a penalty to the king.

*Lee, J.* It appears upon this record, that the judgment upon the attachment was entered upon the defendant's confession, that plaintiff had sustained two pence damages by his proceeding in the court below after the prohibition delivered, which is plainly not for the same cause for which this action is brought; for this action is for unjustly drawing him into a plea in the court below. This is a very different case from those mentioned in *Hobart*, which I take to be law; for if the plaintiff has once taken his remedy at common law, to be sure it may be pleaded in bar to an action upon the statute; as to the *quantum* of the damages, that makes no difference, if the recovery be for the same matter. Court unanimous, judgment for plaintiff (1).

(1) As to the action *sur prohibitionem*, recovered therein, *Bac. Abr.* title *Prosecution* 1 *Wms. Saund.* 156, n. 1. *Id.* 140, *hibition* (M). nn. 2, 4, 5. And as to damages to be.

### HEATH versus BAKER.

Where the defendant entered into a covenant to pay a certain rent for a [ \*320 ] piece of ground, and that the rent should be increased in case an adjoining piece of ground, then in dispute, should be adjudged to belong to the plaintiff, or in case the defendant should by any ways or means come to the possession thereof, and where the defendant did obtain possession thereof from another person to whom he paid rent for the same, held, that in order to entitle the plaintiff to the increased rent, it was not necessary that such adjoining ground should have been adjudged to the plaintiff or obtained by him.

IN an action of covenant plaintiff declares, That whereas by indenture he demised to the defendant a certain rope-walk for twenty-one years, at £20 *per ann.* And whereas by deed reciting that there was a dispute between the plaintiff and another person about the title to a piece of ground adjoining to the end of the said rope-walk, it was agreed, that when the said dispute should be adjusted, and the said piece of land should be adjudged to belong to plaintiff; or if the defendant should by any ways or means come to the possession thereof, so that he, the said defendant, might peaceably and quietly have, hold, and enjoy, and make use of the same,

and where the defendant should by any ways or means come to the possession thereof, and where the defendant did obtain possession thereof from another person to whom he paid rent for the same, held, that in order to entitle the plaintiff to the increased rent, it was not necessary that such adjoining ground should have been adjudged to the plaintiff or obtained by him.

same, as part of the rope-walk by the said lease demised; that then, and from such time as the said plaintiff should give the defendant possession thereof, or if the said defendant should by any ways or means have the possession thereof, the said defendant should pay for the premises in the said lease, together with said piece of ground, for the then remainder of the term, the rent of £30 instead of £20. And he avers, that defendant entered into the demised premises, and afterwards into said piece of ground, but has paid the several rents of £5 every half-year, instead of the yearly rent of £30, amounting to , which he lays to his damage £120.

Defendant prays oyer of said deed poll, which is set out, and then he pleads in bar, that the plaintiff did not dispute or assert his title to said piece of land, nor was the said piece of land ever adjudged to be the right of, or to belong to plaintiff, nor did the defendant by any ways or means by said plaintiff, or by his procurement, or by any person or persons in his behalf, come to the occupation thereof, so that the defendant might peaceably and quietly hold and make use of the same as part of the rope-walk demised; but saith, that one *W. B.* having and claiming a good and lawful title to the said piece of ground, he did, before the defendant entered upon the same, agree with the said defendant that he should have the use or occupation thereof, and the said defendant agreed to pay, and is liable to pay, to the said *W. B.* £5 a year; and he saith, that he entered upon, and is in possession of, the said piece of ground by virtue of the said agreement with *W. B.* and not otherwise; to which plea plaintiff demurs.

Serjeant *Agar* for plaintiff.

Serjeant *Parker*, for defendant, admits, That the letter of the deed is against the defendant; but that all deeds are to be taken according to the intention of the contract, for which he cited the case of *Griffith and Goodhand*, *T. Raym.* 464, and *Sir T. Jones*, 191, [*Skin.* 39. S. C.]; and he would have that, as the defendant did not get possession of said land by means of the plaintiff, it would not be the intention of the deed that he should pay the plaintiff the increase of rent.

Lord *Hardwicke*, C. J. This is a mighty plain case, for we must quite overturn the contract, if we do not give judgment for plaintiff. Shall we say in a court of law, that money shall not be recovered when \*the contract is performed, and the time of payment come? Besides, these general words might be put in the deed, with intention to prevent this very defendant from hindering the plaintiff's recovering this very piece of ground.

Court unanimous: judgment for plaintiff.

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versus  
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[ \*321 ]

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MEDLEY *versus* STOKES.

*Sci. fa.* where it was commanded to the sheriff, that he have there the writ and the names of those by whose oaths he had summoned, &c. the summons not being made on oath, denied to be quashed, but allowed to be amended.

**BICKNALL**, for plaintiff in error, moves to quash a *sci. fa. quare executionem non*, &c. *nihil* returned. The command of the writ is, that he have there this writ, and the names of those by whose oaths he has summoned; and he objects, that this is wrong, because the summons is not to be made by oath.

*Robinson*, for defendant in error: The word oath may be rejected as surplusage; but, however, this is but a process to bring them to assign errors, and is amendable.

*Bicknall* cites a case where a *sci. fa.* was quashed, because not returnable at a good return.

Lord *Hardwicke*, C. J. It is true these writs of *sci. facias* are considered as process to bring in the party to assign error; and for that reason, if he comes in upon it, he can take no advantage of any mistake in the writ, it being considered only as process to bring him in; but now the question is, Whether before he comes he may not take advantage of a fault in the writ? and I think, he may, for he may not afterwards; for he shall be taken then to have waived it, as upon appearance to other process; and this is a fault in the writ; the word oath cannot be rejected, because there will not be a sufficient command in the writ then remaining; but however the court is not *ex debito justitiæ*, bound to quash; but if the party prays it, may order an amendment; the case where the return was bad is a different case. Then

*Robinson* moved, that it might be amended, and had a rule accordingly (1).

(1) Amendments of this writ are frequently allowed, see 2 *Bos. and Pul.* 273: 3 *Bos. and Pul.* 321: 9 *East. R.* 316.

[ \*322 ]

\* FLETCHER *versus* RICHARDSON.

In pleading conditions performed, the rule is, that where there is a negative and affirmative, the having performed the negative must not only be shewn, but likewise the affirmative;

therefore, in an action of debt upon bond, conditioned that a receiver should duly account, and should in all respects behave himself as a receiver ought; and the defendant pleads, that he never received but one penny, which he had paid to the obligee; but did not alledge that he did in all respects behave himself, &c. such plea is bad upon general demurrer.

**ACTION** of debt upon bond, which, on oyer, appears to be, that a receiver of the rents of an estate shall account duly, and shall in all respects behave himself as a steward or receiver ought to do. Defendant pleads, That he never received but one penny, which he paid to the obligee. Plaintiff demurs to the plea, and shews for cause, that he has not pleaded that he did in all respects behave himself as a steward ought.

Lord

Lord *Hardwicke*, C. J. The plea is bad, and what is shewn for cause of demurrer need not, for it is substance; for the rule in pleading conditions performed, where there is a negative and an affirmative, the pleader must not only shew, that he has not performed the negative; but likewise, that he has performed the affirmative (1).

Serjeant *Agar*, for defendant, then moved, that here is a discontinuance, the declaration being of *Hill*. term, and an imparlance to *Trin.* term.

Lord *Hardwicke*, C. J. But it is the course of this court, to give the imparlance upon the declaration till the day of pleading (2).

Judgment for plaintiff.

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(1) Upon the manner of pleading learned editor has collected and discriminated the authorities.  
1 *Wms. Sausd.* 116, n. (1), where the (2) 2 *Tid.* 730.

### HAMILTON versus MACKRELL.

UPON a writ of error on a judgment by default, given in C. B. in an action upon the case against an indorsor of a promissory note; exception was taken to the declaration, for that plaintiff has not averred, that the indorsor had notice of a refusal of the drawer to pay it, for such demand is necessary, in order to charge the indorsor. *Salk.* 127.

Lord *Hardwicke*, C. J. It is here laid, that the defendant was *indebitatus*, and in consideration thereof, he promised to pay it; therefore, upon the face of the declaration, it is certainly well enough; for it does not appear to the court, but that plaintiff may prove an actual promise, and not merely rely on the *assumpsit* in the law; the time to make such an objection is at the trial of the cause, and Lord *Holt* always held it necessary, to prove a demand on the drawer, for he took the indorsor to be only a warrantor; but Lord *Macclesfield*, *Pratt*, and \* *King*, held a demand not necessary, for they look upon every indorsor to be as a maker of a new note, so that it is a point in much doubt, and wants to be settled; but, however, as it now stands before us upon the face of this declaration, I think it is well enough.

*Lee*, J. There has been a case in the Common Pleas, where it was determined, that in order to charge the indorsor, a demand must be proved upon the drawer. 2 *Str.* 1087.

See *Mich.* 31 G. II. *Heylins v. Adamson*, by Lord *Mansfield*, C. J. that a demand on acceptor of bill, or drawer of note, is necessary. 2 *Bur. Rep.* 669.

Judgment affirmed (3).

In order to charge the indorsor of a promissory note, it is not necessary to aver notice of non-payment, to maker. [*Tamen quere.*]

[ \*323 ]

Between

(3) See *pa.* 295, S. P. but see n. (1).



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Between the INHABITANTS of St. NICHOLAS and St.  
PETER'S in IPSWICH.

2 Str. 1066. 2 Sec. Cas. 231. pl. 162. Andr. 365. S. C. Bur. Set. Cas. 91. pl. 22.  
more full S. C.

A service of four years under indentures of apprenticeship for that period, is sufficient to gain a settlement.

And although the 5 Eliz. c. 4, make all apprenticeship in corporate towns for less than seven years void, yet indentures for a less time are voidable only as between the parties.

UPON a special order of session before the justices of Ipswich. The case was, J. G. the pauper, being an unmarried person. and under sixteen years of age, was bound apprentice to A of the parish of St. Peter's, cordwainer, by indenture between the master and apprentice for four years only, and did serve only four years; and hereupon the question was, Whether that apprenticeship had gained a settlement?

This was moved last term, but the court doubting, it was ordered to be spoken to again this term. Abney and Strange of counsel both then and now.

Abney. That this is no settlement. The apprenticeship was upon the *stat. 5 Eliz. c. 4. s. 26.* which requires the binding to be for seven years at the least; and the 41st *sect.* enacts, That all indentures of apprenticeship, otherwise taken than as directed by the statute, shall be void to all intents and purposes. And he cited the case of *Curenden* and *Laland* †, where an order of sessions, that adjudged a service under an indenture of apprenticeship, which was not agreeable to the *stat. 8 Ann. c. 9.* to be a good settlement, was quashed, because, by the 39th *sect.* of that statute, all indentures not made in compliance to that act are made void.

Strange. That this is a good settlement by virtue of the *stat. 3 W. and M. c. 11. s. 8.* which enacts, That binding by indenture and inhabitation shall gain a settlement; at least, it is a good settlement within the 7th *sect.* as being a hiring and service for a year. If the indenture is to be deemed void by statute of *Eliz.* it would be \*very mischievous to say that clause makes all indentures absolutely void, for there are no indentures that comply with all particular circumstances required by the act. He cited *Salk. 533.* Apprenticeship for four years held a settlement.

Lord Hardwicke, C. J. It has been said, that the *stat. 43 Eliz. c. 2.* was the first act for gaining settlements; but that is a mistake, for though that is the first printed act in the common statute-books, yet there were others, both in the reign of *Hen. VIII.* and of *Ed. VI.* which are printed in *Rastall's* statutes.

As to the point now before us, If this is an exception, it is surprising it should not have been taken before now. And I do not find any case where the exception was taken, as to its gaining a settlement. The question is, Whether serving and inhabiting as the law requires, though bound but for four years, will gain a settlement,

† 2 Str. 903. Andr. 364. 2 Sec. Cas. 167, pl. 134. Bernard. B. R. 579, 400, 466, S. C.

ment, and I think it will; the words of the *stat. 5 Eliz. c. 4. s. 26.* are, That a freeman may retain the son of a freeman, to serve to be bound as an apprentice, according to the custom of *London*, for seven years at least; between which section, and the 41st section, there are many other clauses relating to persons liable to be bound apprentice: then the 41st section, That all indentures, otherwise taken than as that act directs shall be void. Now has the 41st section a relation to all the foregoing clauses as far as the 26th section? and if it has, does it make the indentures void, or only voidable? I think it has relation to all the clauses, but I think it does not make the indentures absolutely void, so as to avoid a settlement, but only voidable if the parties think fit to take advantage of any defect. There are many cases where acts of parliament make things void, and yet they are not held to be *ipso facto* void, but only voidable: so upon the *stat. Westm. 2.* which makes a fine levied by tenant in tail, to be *ipso jure nullis*; yet the construction is that such fine is not absolutely void, for it takes away the entry of the issue in tail, and puts him to his action to avoid it. There are other cases of the same sort in *Hob. 336*, and the distinction taken, and particularly which is material in this case, upon the *stat. 23 H. VI. c. 9*, of sheriffs bonds; where the party cannot plead *non est factum*, but must plead the act of parliament, and shew the special matter. The case now in question is, of an indenture between master and apprentice to serve for four years, and the apprentice has served and inhabited for four years, so that it has its effect between the parties, and has not been avoided by them; and it is therefore extremely hard, when the contract is performed, and the parish have had the benefit of the service, to say, that the apprentice shall not have the benefit of his settlement. In the case of *Barber and Dennis*, 1 *Salk.* 68, and 6 *Mod.* 69, it was holden, that an action of trover lay by the master, for two \*tickets earned by his apprentice, though the indenture not good within the statute of *5 Eliz. for Holt* said, he would understaud him an apprentice *de facto*, and that would be sufficient title for the plaintiff; so that he thought, that as the apprentice had not taken advantage to avoid the indenture, and there being an actual binding, the master might maintain an action of trover. Whereas, if statute of *Eliz.* had as strong an operation as has been contended for, to make the indenture void to all purposes, it would have been to that purpose; therefore it must be understood, that the statute only makes the indenture voidable; if they were absolutely void, then if an indenture wants any one of the qualifications required by the statute, it would be void; and that construction would go near to make void all the settlements by apprenticeship, that have happened since the making of the act. Then comes the statute of *3 W. & M. c. 11.* and that statute takes up the validity of the binding as it found it; and did not intend to require any new circumstances, but only intended to take away the necessity of giving particular notice to the parish; and therefore as this is a binding which has had its effect between the parties, it must be a settlement within that statute. There was  
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and  
ST. PETER'S in  
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ST. NICHOLAS  
and  
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the *stat. 27 H. VIII. c. 5.* which is printed in *Rastall* at large, That persons born, or dwelling three years in any place, should be entitled to relief there; but the strict notion of settlements, as they are at present, arises from the *stat. 13 & 14 Car. II.* Supposing then that this present question had arisen between the time of *stat. 5 Eliz.* and *13 Car. II.*, there would then have been no doubt but he had gained a settlement by three years inhabitation; and it would be extremely hard to say, that the alteration of settlements since that time, should make another construction. What puzzled me in this case, was that case of *Curenden and Laland*; but I think that materially differs from this; for in that statute of *8 Ann.* there are not only the words, that it shall be void to all intents and purposes; but the statute says likewise, that it shall not be available in any court or place, or to any purpose whatsoever. And at section 43, the statute says, That such indenture shall not be given or admitted in evidence, unless upon oath made, that the sums therein mentioned were all that was given with the apprentice; so that the order in that case being bad, for they had admitted the indenture as evidence, which they ought not to have done; and it has been resolved, that an order may be quashed, as well for admitting illegal evidence, as for making a bad order upon the merits; therefore in that case they ought to have rejected the indenture as evidence, and then there was no evidence of the apprenticeship before them.

*Lee, J.* It is the constant construction, when an act of parliament makes any thing void, if it is a judicial matter, it must be avoided by writ of error; and if it is any thing that is extrinsic to the deed, \*it must be pleaded. The statute for making void sheriff's bonds is as strongly worded as this statute: so in case of an usurious contract, you cannot plead *non est factum*, but must plead specially, and pray judgment *si actio*, &c.

*Per Cur'*, The order of sessions must be quashed, and the order of the two justices, which removed him to the place of his apprenticeship, affirmed (1).

(1) See 1 *Cons.* 530.

### MIDDLETON *versus* CROFT.

*Ante*, 57. 2 *Stra.* 1056. 2 *Barnard. K.B.* 551. *Andr.* 57. 2 *Kel.* 148. *pl.* 124. 2 *Alt.* 650. 4 *Vin. Abr.* 320. *pl.* 14. [*post*, 395. *S. C.* but not *S. P.*]

PLAINTIFF declares in prohibition, upon a suit in the Ecclesiastical court, against *Middleton* and his wife, for procuring themselves to be clandestinely married to each other; to which declaration the defendant demurs.

This was several times argued at the bar; and this term

Lord *Hardwicke*, C. J. delivered the opinion of the court to this effect:

There

There have been three questions made at the bar; 1st, Whether by virtue of the canons made in 1603, the Ecclesiastical court has power to punish lay persons for marrying clandestinely without banns or licence.

2dly, If they have not, then whether they have such a jurisdiction, by virtue of the ancient canon law received in *England*.

3dly, Supposing they had, such a jurisdiction is taken away by the 7 & 8 W. III. c. 35. s. 4, which inflicts a penalty of £10 upon every man so married.

The 1st question may be subdivided into two. 1st, Whether those canons in 1603, relating to clandestine marriages, do in the words and terms of them, extend to the persons contracting matrimony, or do affect the laity in such a case, as the present case. 2dly, Whether those canons are of authority sufficient to bind the laity (1).

As to the first of those two questions, there are five canons relating to it, the 62d, and 101st, 102d, 103d and 104th. The first of these canons, is to prohibit ministers from marrying any persons without banns or licence; the three next relate only to the persons enabled to grant licences, and in what manner to be granted; and the 104th contains an exception, as to some particular requisites in \*granting licences of persons in widowhood. Now, it is plain, from these canons, that none of them affect the parties married, except a clause at the end of the 104th, which makes a licence obtained contrary to the canons, to be void, and the parties marrying by virtue thereof, to be subject to the punishments for clandestine marriage; but that is not the present case, for no void licence was here alledged, but a positive charge of a clandestine marriage without any licence at all; so that these canons do not in the terms of them extend to the laity, in the case now before the court; then

2dly, Supposing this case were within the words of those canons, is the authority, by which these canons were made, binding upon the laity? The authority by which they were made is the convocation; and it was objected, that these canons, though made in convocation, never having been confirmed by parliament, cannot bind the laity; and for my part, I always understood, that the law in later times has been, that those canons in 1603 do not bind the laity, for want of parliamentary confirmation; and indeed it was admitted, by one of the counsel for defendant, that they do not *proprio vigore* bind the laity, and he insisted only on the second general point; but, as it was insisted on by other counsel of the defendant, that those canons do *proprio vigore* bind the laity, it is now become necessary to examine into that question, in order to settle the law thereupon; and we are all of opinion, that the canons made in 1603, not being confirmed by parliament, do not *proprio vigore* bind the laity; I say *proprio vigore*, for there are many of those

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(1) As to the authority of these canons, see Lord Kenyon's, C. J. observations, 6 T. R. 493.

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those canons which are only declaratory of the ancient usage in the church, which by reason of such ancient allowance will bind the laity.

For the illustration of this argument, it might be proper to look into the accounts of the ancient councils holden in this kingdom in the *Britons* and *Saxons* time; but whoever looks through the laborious collections of Sir *H. Spelman*, will find no great satisfaction as to this matter, because those councils were mixed assemblies of clergy and laity; sometimes the king, and sometimes the nobility, and sometimes the commons were present; but whether they had any part in making the canons, or not, is entirely in the dark. The like may be said of the several councils after the coming in of the *Normans*: and in those following there is often a mixture of the legantine authority, which subsisted merely by papal usurpation; therefore it is safer for judges to proceed upon surer foundations, viz. Upon reasonings drawn from the nature and fundamentals of our constitution, upon the acts of parliament, and judicial opinions and resolutions.

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\*As to the general nature and fundamentals of our constitution; no new law can bind the people of this land, but what is made by the king and parliament; nor any law made by the king alone, nor by the king with consent of any particular number or body of men; so is the parliament roll of 2 *Hen. V. Pergamen. 2*, N<sup>o</sup> 10, and 12 *Co. 74*, and therefore my Lord *Coke*, in the 4 *Inst. p. 1*, says, that these represent the commons of the whole realm; and by reason of this representation, all men's consent is included in an act of parliament. But to the making canons in convocation, these are all wanting, except the royal assent, for there are neither peers nor commons represented.

To this it was objected, that the binding force of an act of parliament, does not arise from an actual representation of the people, but from an implied representation only; for that in fact, there are many ranks of men who have no vote in electing members of parliament, and, consequently, have no actual representatives; and that the minister of every parish, who is the guide of his parish in spiritual matters, does represent the people of his parish, in choosing a member for the convocation.

And it is true, there are many persons who have no votes for members of parliament, such as women, copyholders, &c. but yet, notwithstanding, there is an actual representation of the whole realm; for no election can be made, but some rules of qualification for the electors must be laid down; and the best rule that can be, is, as in the choice of members of parliament, for those to be electors, who are possessed of the most valuable and fixed sort of property; though as to the quantity, it has been restrained by latter acts of parliament. But it is a new notion not known in our books, That the rector of a parish, when he votes for convocation men, does represent the parish: nor can he be their representative, since he is not chosen by the parish, but by some bishop or lay patron.

patron. Besides, it is a notion which is contradicted by the very writ which issues to the metropolitan, to summon the convocation, which is to summon *totum clerum*; and is contrary to the premisory clause in the writ of summons to the diocesan bishop, which is *clerum per duos procuratores, plenam et sufficientem potestatem ab ipso clero habentes*; which [words] import that the clergy only are called, and that their procurators represent the clergy only, and have their power from and for them, without any representation of the laity: agreeable to which, my Lord Coke says, 4 *Inst.* 322, that in the convocation, the whole clergy of either province are either present in person or by representation.

\*There is no doubt, but the canons made in the ancient councils of the church did bind all persons; but the difference between those canons and the canons now in question, lies in the root from whence their obligation sprung: for the binding right of those ancient canons was not from the emperor's being head of the church, but from his having the supreme legislative power in his own person; for by the *Lex Regia*†, which is mentioned in *Justinian's Inst. lib. 1, tit. 2, s. 6*, the whole power of making laws was devolved upon the emperor; but in *England* it is far otherwise, for here the king has but a part of the legislative power; and the reasoning of the counsel, in the case of *Matthews and Burdett*, in 2 *Salk.* 673, is of great weight, and stands unanswered. The answers now attempted to be given to it were two; first, That the emperor's consent to these ancient canons was only necessary in order to give them a civil sanction; but, though that was said, it was not proved; nor do I find any temporal penalties annexed to them. 2dly, it was said, That wherever the law has lodged a power, that includes a consent of the people, and such consent is, therefore, included in the royal confirmation; but this answer begs the very question, Whether or no the law has deposited in the crown a power of binding the laity by canons, without consent of parliament.

Another argument drawn from the nature and fundamentals of the *English* constitution is, That the power of binding the people by any law, and that of charging them with taxes, are co-extensive powers; and thus our parliament hath power to make laws, and to impose taxes, whereby all persons are bound; but the clergy never pretended to grant tenths or fifteenths to bind any persons but themselves; that is, the body assembled in convocation, or there represented; and it is absurd to say, that the clergy in convocation can charge the laity with any tax, nay not so much as create or impose a new fee; and that they can, notwithstanding, enact a new law to bind them, though but *in re ecclesiastica*, for thereby they are liable to excommunication, and consequently to imprisonment, which will, therefore, affect the laity in the highest degree, viz. in the loss of liberty.

Again.

† That law was made in the time of *Augustus*. Vide *Comment' Vinerii in hoc*,

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Again. The rule of any constitution in any particular case cannot be better discovered than by the constant usage in the like cases; and the constant usage since the reformation, which is going far enough back, has been whenever acts of convocation have been intended to bind the laity, to have them confirmed by act of parliament. Of this, several acts of uniformity, and those for establishing the book of Common Prayer, are so many instances; for by them the very rites and ceremonies of the church are established: and \*though those matters were approved of in convocation, yet it is plain from the making of those statutes, that the members of that house were looked upon only as an assembly of learned men, fit to propose such regulations, but not to give them their force.

To this it was answered, that the reason of making those acts, was for the sake of enforcing those canons, &c. by civil sanctions and penalties; and, to be sure, that was one reason, but not the only one; for, if it had been the prevailing opinion of those times, that the clergy might make canons to bind the laity, it is astonishing that they could not trust such a minute matter to an ecclesiastical censure.

It was likewise said at the bar, that the legislative power of the convocation is co-extensive with the jurisdiction of the spiritual court; and that the spiritual court having always had a jurisdiction over laymen for clandestine marriages, the convocation must, therefore, have authority to bind laymen in that matter. But in that too much is taken for granted; it is true, indeed, that the spiritual courts have jurisdiction of matrimonial and testamentary causes, of tithes, and of several crimes of a spiritual nature; but if it were true, what is inferred from thence, it would equally follow, that the convocation might make canons to limit the degrees of consanguinity, to regulate the right of administration, &c. and so they might, without consent of parliament, change the law of descents, or the laws relating to the disposal of personal estates, or the law of tithes, &c. And several crimes might be altered, or actions made to be crimes, without authority of parliament; therefore, the power of binding by canons in convocation cannot be co-extensive with the judicial authority of the spiritual court. And in truth, when any alteration has been made in the law as to those matters, it has always been by parliament. Witness the stat. 32 Hen. VIII. c. 9, as to the degrees of consanguinity; stat. 21 Hen. VIII. c. 5, and 2 & 3 Edw. VI. concerning tithes; the stat. 23 Car. II. c. 10, as to administrations, and several others.

If this doctrine had been law at the time of the stat. of *Merton*, 20 Hen. III. c. 9, the bishops need not have applied to parliament to have bastard eigne legitimated; for as the ecclesiastical court had power to judge of general bastardy, 2 *Roll.* 586, *pl.* 25, they might have made a new canon for that purpose themselves, notwithstanding the refusal by the house of parliament.

There is but one case which seems to confirm that doctrine  
laid

laid down in behalf of the defendant, and that is in 1 *Roll. Abr.* 909, *tit.* 1, *pl.* 5; which says, that it is ordained by a canon, 1 *Jac. c.* 93, that *bona notabilia* shall be reckoned at £5 at least, and that none shall be said to have *bona notabilia*, unless he have goods in \*divers dioceses to the value of £5, and *Semble*, says the book, that this canon has changed the law, if it were otherwise before, in as much as the granting administration belongs to the ecclesiastical law; and our law only takes notice of their law in that, and therefore they may alter it at their pleasure: *Needham's* case; and this case indeed speaks pretty freely, but the authority of it amounts to little, for though *Perkins* says, *s.* 489, that 40s. in two several dioceses were *bona notabilia*, yet, in fact, before that time there were canons which required there should be £5 to be so; so that the canon of 1 *Jac.* mentioned by *Roll*, was really no change of the law; but however taking that case at strongest, the alteration made by that canon was in effect but a regulation among themselves, for a proper distribution of fees arising from administrations between the metropolitan and the diocesan bishop; and is the same case reported in *Coke*, as I take Sir *J. Needham's* case, 8 *Co.* 135, to be; there is no mention of any thing like what is in *Roll's* Abridgment. But, however, this is a point of too great consequence to be determined by such a loose saying in an abridgement, (though I admit the book is of great authority) contrary to the general reason and rules of our law.

As to what regards the statute law in this point, there having been no positive declaration made by statute in this matter; the only thing we can do is, to form a judgment as to it, by inferences drawn from acts of parliament. Now the several statutes of uniformity are a proof, that the opinion of parliament was, that themselves, only, had a power of making canons to be universally binding. The stat. of 25 *Hen. VIII. c.* 19, which was made for commissioners to review all the canons then in being, and to continue or abridge such as should be found lawful, or otherwise, and the several statutes made for continuing that act, and which are printed in *Rastall's* statutes, are all silent as to the declaring in what persons or body, the power of making canons is lodged, or over whom the binding authority of canons extends. However, that statute furnishes two observations; first, that both the king and clergy at that time of day, thought it, at least, convenient, that authority of parliament should interpose in the abrogating some canons, and enforcing others; whereas, had it been the opinion of those times, that this power was in the convocation, the king might easily have found other methods of doing it, without having recourse to parliament; and every one knows, that this king was as jealous of his prerogative, and carried it as far as any. Besides, 2dly, If that method directed by the act of doing it by commissioners, had been carried into execution, the binding force of the canons by them reviewed, would have arisen from the parliament; for, whatever

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ever act is done by virtue of a power given, receives its force and validity from the givers of the power.

\*As to the judicial opinions and resolutions relating to this head. The first case is that of the Prior of *Leeds*, 20 *Hen. VI.* 13, and *Bro. Ordinary*, *pl.* 1, it does not appear that case was determined; but the argument turns upon this point, whether the prior, who had the king's letters patent to discharge him from being collector of the tenths during his life, whether he being appointed collector by the archbishop of a tenth granted by the clergy in convocation to the king, and not having, either at the time of choosing or voting the tenth, prayed his privilege to be allowed in convocation, had not waived that privilege; and the chief justice says, That whether his letters patent had been allowed in convocation or not, would be nothing to the purpose, because they have power over none but things merely spiritual; and then *Newton, J.* says, the convocation has power to make holy-days and fasting-days, but not to allow or disallow the king's patent; and though they have power to make constitutions provincial, whereby those of the holy church are bound, yet they can do nothing to bind the temporality; and this opinion has never been denied to be law by any body. The next case is the Abbot of *Waltham's* case, 21 *Edw. IV.* 45. He, upon being appointed collector of a tenth granted in convocation, pleaded the king's letters patent of exemption; and one objection was made to the plea, that he should have no advantage of the letters patent, because there was a *proviso* in the act of convocation, that no letters of exemption should be a privilege from collecting, &c. *sed vide ib. fo.* 48, *b.* said to be the opinion of all the judges in the Exchequer chamber, given by *Hussey, C. J.* there, that the abbot should have advantage of his letters patent, and that he was not estopped, &c. though judgment was at last given against him, because he had not pleaded the record of the letters patent with certainty enough. No judgment is given, but in the argument much is said about the power of the convocation; and *Catesby* argues, that he cannot have advantage of the charter at this time, because he himself has agreed not to take advantage, he being party and privy to the *proviso*; for, says he, among the clergy, the convocation is as strong as is the parliament among the temporals, and every one to whom an act of parliament extends is bound by it, because every man is party and privy to the parliament; so every abbot, prior, and other beneficed clerk, is privy and party to the convocation, and shall therefore be estopped by the acts of convocation. And *Pigot* adds, The clergy may bind themselves by an act of parliament. To which it was answered by *Vavasor*, That he shall not be estopped, because the convocation has not power to *ascun* temporality, but *ceo que est* spiritual, viz. to ordain fasting-days and holy-days, and they are only spiritual judges; and therefore, it would be unreasonable to require him to shew his letters patent, \*which are temporal things, to judges who had no power to allow or disallow them.

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Upon these two cases, the defendant's counsel observed, That *Broke* in his Abridgment of the Prior of *Leeds's* case, has mistaken the year book; for he puts it, that the convocation have not power to bind the temporality; which indeed, say they, does mean temporal persons; but in the year book, it is *la* temporalty, which means temporal matters: but upon looking into the old edition of the year books, I find the words to be *le* temporalty, though indeed the later editions, it is *la* temporalty, and that is a full answer to the objection. And it was said too, that the question in that case, was as to their power of binding in temporal matters, and not of binding temporal persons; and that is true: but yet *Newton's* answer remains as his opinion at large as to the power of the convocations. And that by the words *le* temporalty, he means temporal persons, is plain from their opposition to *ceux de Saint Eglise*, which means the clergy, as *Broke* construes these very words. The same observation was made upon the Abbot of *Waltham's* case, viz. That the question was only about temporal things, and it is true; but it appears plainly, that it was taken for granted throughout the case, that the power of the convocation extended only to bind the clergy. And as to what *Vavasor* says, that they have not power to bind *ascun* temporally; that means, that they have not power to bind the temporal matters of even the clergy themselves.

The next case is, the convocation case in 12 Co. 72, where there is the like opinion, and founded on those two cases in the year books. Indeed, it is said at the end of the case, that they can do nothing against the law of the land; for every part of the law, be it common law or statute law, cannot be abrogated or altered without an act of parliament, to which every one shall be party, except the spiritual causes, or which concerns spiritual persons, if it be against the prerogative of the king and the common law; these are the words of the books; but it is certainly misprinted, for they are neither grammar nor sense, and therefore I will not attempt to explain them.

In 5 Co. 32, *b. Caudrey's* case, it is laid down, that such canons as have been allowed by general consent and custom within the realm, and are not contrariant to the laws, nor to the king's prerogative, are still in force; and as consent and custom hath allowed these canons, so by general consent of the whole realm, any of them may be corrected, enlarged, explained, or abrogated. In *Moore*, 755, case 1043, and S. C. *Cro. Ja.* 37; held by all the judges, that the deprivation of puritan ministers by the High Commissioners for refusing to conform to the ceremonies appointed by the canons of *Ja. I.* was lawful, because \*the king has the supreme ecclesiastical power, which he has delegated to the commissioners; and that the king, without the parliament, may make orders and constitutions for the government of the clergy, and may deprive them if they obey not. In the case of the Bishop of *St. David's* and *Lucy*, it is laid down by *Holt*, that all the clergy are bound by

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by the canons, confirmed only by the king, but they must be confirmed by the parliament to bind the laity, *Carthew*, 485. The same case is in 1 *Salk.* 134. *Lord Raym.* 447. 12 *Mod.* 38, 3 *Salk.* 90, and appears to be to the same effect; and both the late *Lord Raymond*, and the Lord Chief Justice *Eyre*, in their manuscript notes of that case, which I have looked into, agree with *Carthew*; and the words in *Lord Raymond's* note † are these: The clergy are subject to the canons, for the convocation may make canons to bind the clergy, but not the laity. In *Britton* and *Standish*, 6 *Mod.* 190, said *per Holt*, that no canon, if not an ancient canon, and received here before the year 1603, though made in full convocation, can *proprio vigore* bind laymen. That book is not of the greatest authority or correctness, but it is of the greatest authority in this case, because this opinion of *Holt* is agreeable to his declaration in the case of the Bishop of *St. David's* and *Lucy*. In *Davis's* case, *Mich.* 1 *Geo.* I. in *C. B.* a prohibition was moved for to a suit of the ecclesiastical court for teaching school without licence, and the prohibition refused, because the Schism act stood then unrepealed; but *per Lord King*, it is the prevailing opinion, that the convocation cannot make canons to bind the laity.

The cases cited for the defendant were *Bird* and *Smith, Moore*, case 1083, p. 781, where it is said to be resolved in Chancery by the Lord Chancellor, with the assistance of *Popham* and *Coke*, Chief Justice, and *Fleming*, Chief Baron, That the canons made by the convocation and the king, without the parliament, shall bind in all ecclesiastical matters as well as an act of parliament; for that by the common law, every bishop in his diocese, archbishop in his province, and house of convocation in the nation, may make canons to bind within their limits; and that when the convocation makes canons of things pertaining to them, and the king does confirm them, they shall bind all the realm. The case itself is a very extraordinary one, and the decree made in it would not be allowed as a precedent at this time of day, and that is one good cause not to allow of the reasoning on which it is built; for it is a decree to turn a parson out of possession of his benefice upon a sentence of deprivation; the force of which sentence was, at the time of the decree, suspended by appeal; and as for the particular opinion for which that case has been now cited, is there any the least colour of law for it? Can any diocesan make laws? No sure; and it is there said he might: but however, even in this case, it is not expressly, said in so many words, that the convocation \*could bind the laity and all the power necessary to be allowed them in that case was a power to bind the clergy, for both the parties there were clergymen. The next case was *Vaughan*, 327, where it is said, that a lawful canon is the law of the kingdom, &c. and that is true, but proves nothing, because it does not determine what is necessary to its being a lawful canon; and therefore is nothing to this purpose.

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† *Lord Raym.* 449.

The last case was *Grove* and *Dr. Elliot*, 2 *Vent.* 41, where *Tyrrell*, J. holds, that the king and convocation without the parliament cannot make canons which shall bind the laity, though they may the clergy. But *Vaughan*, Ch. J. differs from him, and holds, that the canons in 1603 are of force, though never confirmed by parliament; and that the convocation, with the assent of the king, may make canons to regulate the church, as well concerning laics as ecclesiastics; and that all that is required of them is, that they confine themselves to church matters; and it does appear from this case, that *Vaughan* was of a different opinion from what the court has now delivered; but that opinion of his was given upon a sudden motion, and one of the judges differing from him at the time; so that it is only the opinion of one single judge against another, and all this in a point not necessary to the determination of the case in question.

Upon the authorities on both sides, it is an easy matter to decide which preponderate. As to the case of *Bird* and *Smith*, no weight can be laid upon the opinion there given, so that there remains only for the defendant the single opinion of *Vaughan*; to which I oppose the opinions of *Newton*, *Pigot*, *Coke*, &c. (1).

The second general opinion is, admitting that the Ecclesiastical court has not power to punish lay-persons for clandestine marriages by virtue of the canons in 1603, whether it has such a power by virtue of the ancient canon law received and allowed in *England*? And we are all of opinion that it has. I have already mentioned what is said in *Caudrey's* [case], in 5 *Co.* that the ancient canons not contrariant to law, &c. are still in force as the king's Ecclesiastical laws. And this is warranted by the reason of the thing, and by the express words of the preamble of the stat. 25 *Hen. VIII.* c. 21, concerning *Peter Pence* and dispensations; and though the stat. 25 *Hen. VIII.* c. 19, which was for appointing commissioners to review the canons, has no such express words as that those canons, which consent and custom have allowed, are binding, yet there are words of that import; and the stat. 25 *Hen. VIII.* c. 16, was made for the continuance of the last-mentioned statute, makes use of the very words custom and usage. Here, therefore, rests the sure foundation of all ecclesiastical jurisdiction within this realm; and of this a good account is given in a manuscript of the late Lord Chief Justice *Hale*, which I have perused. The laws of the church, \*says he, must have been established either by force, or by consent and submission of those that received them; for christianity entered not any where with an external discipline; if their establishment was a submission of the civil power, then it was the civil power which gave them life; if the submission was by particular persons only, then it was no more than a private compact, which could have no force, other than as a custom; and like other customs and civil usages.

It

(1) The same case as reported 2 *Str.* 1056, is cited for this point *arguendo*, 1 *Moul. & Selw.* 205, 211.

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It remains to be seen therefore, Whether the canon made against clandestine marriages has been received and allowed in *England*. The canon prohibiting marriages without banns or licence, was a canon of the council of *Lateran*, and is in the *Decretals*, lib. 3, c. 3, tit. *Cum Inhibitis*; and in *Lyndewood's Provincial*, lib. 4, tit. 3, *De Clandestina Desponsatione*, and was brought into the *English* canons in 3 *Edw. III.* and it was said to appear from instances in the court of the Archbishop, that this canon has been allowed in *England*; but those instances are but weak, because they might have passed without contest; but in Sir *W. Jones*, 257, in the case of *Matingley v. Martyn*, the jurisdiction of the Ecclesiastical court in this point has received the sanction of this court; for it is there expressly resolved, that if any persons marry without proclamation of banns, or licence to dispense therewith, they are citable for that into the Ecclesiastical court, and no prohibition lies. That resolution is in point, and I can find no authority against it; and this jurisdiction is the rather to be supported, because, though clandestine marriages have always been complained of, as disturbances to the peace of families, yet if they had not such a jurisdiction, lay persons must have been utterly unpunishable, until the statute of 7 & 8 *Will. III.* c. 35, which is not to be believed. But then,

3dly, Does that statute of 7 & 8 *Will. III.* c. 35, take away the jurisdiction of the Ecclesiastical court in this matter, by inflicting a penalty of £10 upon every man so married? and before I consider the effect of this statute upon the main question, I would observe, 1st, That though some doubt was made at the bar, Whether the clause in that statute relating to this matter, being only made, as the statute expresses it, for the better ascertaining, levying, and collecting the duties upon marriages and licences, which were granted by temporary laws, be not now expired; yet, upon looking into the stamp acts, it plainly appears to be still in force; for by the stat. 8 & 9 *Will. III.* c. 20, those duties were continued until 1706. Then by 1 *Ann.* stat. 1, c. 13, they were further continued until 1710; and, by stat. 5 *Ann.* c. 19, they were continued from thence for ninety-six years. And that statute enacts, That the act for granting said duties, and all the provisions and clauses therein, or in any other act of parliament \*then in force concerning the said duties, shall continue for that time. 2dly, That this penalty is by the statute inflicted only upon the husband; the words of the act being, "That every man so married shall forfeit;" so that if the jurisdiction of the Ecclesiastical court were taken away by the operation of this statute, it is only taken away as to the husband, and therefore, that even in that case a consultation should go as to the wife.

We are all of opinion, that this statute of 7 & 8 *Will. III.* has no operation to take away the jurisdiction of the Ecclesiastical court in this matter, even as to the husband: the general question is, Whether a statute giving a temporal penalty of an offence of Ecclesiastical

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Ecclesiastical cognizance, takes away such jurisdiction, if it be not saved by the statute; and this is a question which has been much debated. In the case of *Grove* and *Dr. Elliot*, in 2 *Vent.* 41, the whole court of Common Pleas was of opinion, That the Spiritual court might proceed against conventicles, as a spiritual offence; although at that time the act of parliament against conventicles was in force. So in the case of *Cory* and *Pepper*, 2 *Leo.* 222, [Sir T. Jones, 131, S. C.], it was held, that the statute of uniformity in 13 *Car.* II. which gives a penalty of £5 for teaching school without licence, does not take away the jurisdiction of the Spiritual court to proceed in such case upon the canons: but then in the case of *Chedwick* and *Hughes*, *Carthew*, 464, there is a resolution directly opposite to that in *Cory* and *Pepper*; and this very question, Whether a temporal penalty imposed by statute, without saving ecclesiastical jurisdiction, does abolish that jurisdiction, was very much debated in the case of *Matthews* and *Burdett*, 2 *Salk.* 573; and does not appear to have been ever determined: and the case in *Carthew* is subsequent to the two others, and this in *Salk.* is subsequent to them all. Now it must be admitted, that whenever two proceedings are levelled in the same way, and against the same offence, the rule that *nemo bis puniri debet pro uno et eodem delicto* would hold; but the present case, we think, is a middle case between the two cases before the court in the books before cited. As to teaching school without licence, the penalty inflicted for it by the stat. 13 *Car.* II. for uniformity is inflicted *eo nomine* for the same offence; and the intent of it is the same as the proceeding in the Ecclesiastical court; but in this case, the penalty is not inflicted upon it as an ecclesiastical offence, but only collaterally, to secure the duties upon licences; and therefore the present proceeding in the Spiritual court is *diverso intuitu* from the statute, and this is a case *ubi eadem causa diversis rationibus coram judicibus ecclesiasticis & secularibus ventilatur*, as the statute of *Articuli Cleri* speaks, 2 *Inst.* 622. The proceeding in the Spiritual court is to prevent ill example, and to punish for a breach of order in the church; but the penalty inflicted by the statute, for a fraud on the public revenue; and this intention\* of the statute does not appear upon a construction made upon it, but from the express words of it; in the same manner the stat. 18 *Eliz.* c. 3, concerning bastard children, does not only give the justices a power to indemnify the parish, but also to inflict a temporal punishment on an act of lewdness; but yet the intention of the act's punishing the lewdness, is not as it is a temporal offence, but only in order to prevent the charges thereby brought upon parishes. But the proceeding against such offence in the Spiritual court is, as it is a spiritual offence; and therefore these two punishments being *diverso intuitu*, have been suffered to go on hand in hand. This distinction that has been made, that the punishment in the Spiritual court is *pro salute animæ*, and that in the temporal courts is upon the body and purse, and that therefore they are *diverso intuitu*, is a distinction

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tion but in words, for the end of all punishments whatever, is only for the reformation of the offender, and for the sake of example.

The present case may likewise be distinguished from the cases above cited in another respect; for it is required by the rubrick, that the banns must be published in the church, which rubrick is confirmed by, and made part of the statutes of uniformity. The stat. 1 *Eliz. c. 2. s. 16*, has these words, after having directed, that all ministers shall use the book of common prayer, in such order and form as is mentioned in the said book, That all bishops and their officers, having ecclesiastical jurisdiction, shall have power to punish by censures of the church all persons offending against that act. The stat. 13 & 14 *Car. II. c. 4. s. 24*, has these words: "That all the statutes of uniformity shall be in full force to all intents and purposes whatsoever, for the establishing and confirming the book of common prayer, and shall be applied, and put in use for punishing all offences contrary to the said laws, with relation to the book aforesaid;" from whence it follows, 1st, That the laity are bound by the rubrick from clandestine marriages. 2dly, That by the stat. 1 *Eliz.* the Ecclesiastical court has jurisdiction to punish offences against that act. 3dly, That by the stat. 13 & 14 *Car. II.* that power is to be applied in punishing offences against the rubrick.

And hereupon a new question arises, Whether, supposing that the penalty inflicted by this statute will take away the ancient jurisdiction of the Ecclesiastical court established by allowance, it will take away a jurisdiction expressly given them by act of parliament? Now as to that, subsequent acts of parliament in the affirmative only, though giving new penalties, are never taken to be a repeal of former acts, unless there be negative words, or a plain contrariety between the two acts, so as that there is a plain indication in the latter of an intention to repeal the former; but in this statute of 7 & 8 *Will. III.* there are no negative words, and it is declared to be for a different purpose merely, viz. to secure the stamp duties.

And, as we think it our duty, not to weaken any lawful method, whereby clandestine marriages may be prevented; we think a consultation must go as to that. But as to the not marrying between the hours of eight and twelve in the morning, the prohibition must stand, because there is no canon requires that but the canons of 1603 (1).

(1) See stat. 26 *Geo. II. c. 33.*

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**A**CTION upon the case for speaking these words, *Robert Carpenter* was in *Winchester* gaol, and tried for his life, and would have been hanged, had it not been for *Leggat*, for breaking open the granary of farmer *A*, and stealing his bacon. After verdict for plaintiff, *Serjeant Eyre*, moved in arrest of judgment; and a rule was made, That all things should stay; his objections were, 1st, That these words were not actionable, and are nothing more than an account of a trial, touching the breaking open the granary; and that these words are not actionable, he cited *Gardiner's* case, 4 Co. 16, and *Cro. Eliz.* 371: *Hobart*, 77, *Coote and Gilbert*: *Hutton*, 2, and *Noy*, 24, *Steward and Bishop*: *Cro. Eliz.* 279, *Bayly* and *Charrington*: *ib.* 834, *Lovet and Hawthorn*. 2dly, He objected, That to make these words actionable, there should have been an averment, that plaintiff never was in gaol and tried for his life; and for that he cited the case of *Bland and Edmunds*, in *Hob.* 219, and *Brownlow*, 13, 1 *Roll. Abr.* p. 64, pl. 6. 1 *Lev.* 82, *Crawford* and *Middleton*.

*Serjeant Chapple*, for plaintiff. As to the first objection cited *Cro. Ja.* 154, *Showell* and *Ilaman*: *ib.* 274, *Heynes* and *Sprot*: 2 *Roll. Rep.* 141, *Searle* and *Maunder*: *Palmer*, 68, *Brown* and *Audley*: *Cro. Eliz.* 589, *Redfern* and *Todd*: *ib.* 786, *Royal* and *Peckham*: *ib.* 904, *Willymote* and *Wetton*, and the case of *Button* and *Heyward*, *Hil.* 7 *Geo.* I. 8 *Mod.* 24, where these words were held actionable, He is the man that has killed my husband; and the court in that case said, that formerly actions for words were discouraged, but now they are encouraged, and are to be understood by the court in the common acceptation of them. As to the second objection, he cited 1 *Vent.* 117, *Phillips* and *Kingston*: 1 *Sid.* 277, *Bull* and *Mayo*, and 1 *Lev.* 297, *Jones* and *Powell*, which was soon after the case of *Crawford* and *Middleton*, [1 *Lev.* 82], cited for defendant.

*Lord Hardwicke*, C. J. As to the first question, this is one of those cases that are frequent, in which the difference betwixt the old rules \*and modern ones come in question; and I should think, that according to all the rules laid down of late years, these words are actionable, for they import a scandal; the very charging a man of having been in gaol is a reproach, and it must be a very strong intendment, to have them mean only, that he was acquitted by *Leggat*; *Cardan's* [probably *Gardiner's*, cited from 4 Co. 16] case is a very strong case for defendant; but if those words were to come in question now, they would be held actionable; but there is a very strong case on the other side, and not a modern case neither, which is *Halley* and *Stanton*, *Cro. Cha.* 268, where the words were, He was arraigned for stealing twelve hogs, and if he had

The words "C. was in W. gaol and tried for his life, and would have been hanged had it not been for L., for breaking open the granary of farmer A. and stealing his bacon," held actionable.

Averments of the falsity of the charge not necessary, the gist of the action being, whether the words were spoken falsely and maliciously.

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had not made good friends, it had gone hard with him; which words are very like the present words, and were held actionable. Indeed in that case there was an averment that he never was arraigned, and the court said, the speaking was the more malicious, as it appeared by the averment to be false; and several cases are here cited to support that resolution. So that according to that case, an action is maintainable for the words now in question, for they are as strong as those in that case (1).

2dly, Is there any necessity for an averment in this case? I take it there are many cases where averments were anciently thought necessary, but are not so of late times; and I take it, that the words being here laid to be spoken *falso et malitiose*, are an averment that the words are false; for if they were spoken falsely, the words could not be true; and if they were true, it lies upon the defendant to shew that in mitigation of damages; for I believe there are cases that it may be given in evidence for that purpose; but however that is not the case here: if, therefore, the modern authorities are, that an averment is not necessary, then the case of *Halley* and *Stanton* is in point, for there without an averment the words were held actionable; so that I think the declaration is good.

*Lee, J.* This resolution can be no hurt to the defendant, for if these words had been only a narrative of what passed at the trial, he might have pleaded it so and justified, though at the trial it could only have been given in evidence in mitigation of damages; the true gist of the action with respect to the defendant being, whether he spoke the words falsely and maliciously.

*Tot' Cur' accord.* The rule discharged (2).

(1) See *Cro. Jac.* 536.

(2) See the cases collected, *Starke* on Libel, 85, et seq.

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\*HILL versus FLEMING and Others.

Where in an action against three, one pleads that himself and another is not guilty, upon which issue is joined, and verdict for the plaintiff, held that this is an informal not an immaterial issue; *aliter*, semble, had the verdict been for the defendant,

**ACTION** of assault against three defendants; two of them came in and confessed the action, and the other pleads in this manner, And the said defendant *J. F.* comes and defends the force, &c. and saith, that the said *J. F.* and *H.* (one of the other two defendants) is not guilty of the assault, upon which issue was joined; and the jury found, that the said *J. F.* is guilty of the assault in manner and form as plaintiff has declared; and assess damages.

Hereupon it was moved in arrest of judgment, for that this was an immaterial issue; and upon such an issue the jury cannot assess damages. 1 *Salk.* 173.

Lord

Lord *Hardwicke*, C. J. This is not an immaterial, but an informal issue, and as this verdict has found, it is well enough; it is good, either, by rejecting the words which should not have been in the plea, or by not rejecting; for, according to the rules for rejecting words, these may be rejected as being repugnant to the other part of the record which went before, and to the verdict which follows them; and therefore, as not applicable to the person that pleads, nor to the verb which is in the singular number: but without rejecting them, the verdict here being found for plaintiff, it will be well. If this be only bad *English*, it will be helped as bad *Latin* would have been. Where several defendants pleaded not guilty, they say in general, *non sunt culpabiles*; and they do not say, that they nor each of them are not, nor is guilty; and yet that general expression refers to each of them severally, and is, therefore, of the same import as such a particular plea would be; and if this plea had been so several and particular, that would be a good plea for defendant, because it is a denial for himself, though the rest of the plea as to the other had been surplusage; this issue must therefore be taken in the same manner. But, however, as I said, the verdict being found for the plaintiff, makes it a good issue, though it might have been an immaterial issue if found for defendant. Like as where a defendant pleads payment before the day, if the verdict is for the defendant, the issue will be good; but if the verdict be for plaintiff, the issue is then immaterial, because there then appears no breach; whereas, if found for defendant, it is a discharge, and therefore good; and so was *Nicholl's case*, 5 Co. 49; and here, if the verdict had been, that all the defendants were not guilty, then the issue would have been immaterial; but as it is, it is well enough.

\* *Lee*, J. An immaterial issue is, when an issue is joined upon a fact which does not tend to the determination of the dispute between the parties: but though there might be a plea which would be bad on demurrer for that reason, yet if issue taken upon it, the verdict may fix the fact for one of the parties so as to settle the dispute. The most that can be said in this case is, that the plaintiff has joined issue informally.

Rule for staying all things discharged (1).

(1) See 2 *Wm. Smith* 319, n. 6. *Cott. Dig. Pleading*, (R. 2.)

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DODD *versus* ATKINSON.

In an action of debt upon charter-party the breach assigned was, that defendant had not paid to plaintiff for the freight, 200*l.* with average according to the charter party, but without stating any amount as to average, held certain enough.

Averment of notice of a fact of which defendant must be cognisant, unnecessary; and although it might be necessary the defect is aided by pleading over.

Where it is stated, that the defendant *assented*, it must be inferred that it was by deed, and although the instrument declared upon were not sufficient [ \*343 ] shewn to be a deed, yet the defect is aided by pleading over.

**ACTION** of debt for freight upon a charter-party; defendant pleads specially in bar: and plaintiff demurs. The plea was given up as bad on both sides, and three exceptions taken to the declaration.

First exception. That the assignment of the breach being laid, for that defendant has not paid to plaintiff for the freight £200, with average according to the charter-party; which uncertainty of what the average amounts to, makes the assignment bad.

Second exception. That the declaration does not alledge, that that defendant had sufficient notice of the goods being delivered: it is laid, that the ship sailed, &c. and returned to *London*, whereof the defendant had notice; that the ship stayed fourteen days, and unloaded and delivered the goods to the defendant, and then ended her voyage.

Third exception. That it is not here sufficiently shewn, that this charter-party was a deed, and therefore not grounds to maintain an action of debt upon specialty, as this is.

Lord *Hardwicke*, C. J. As to the first exception, it is true, if the assignment of the breach had been, that the defendant did not pay the freight with the average, it would have been bad; but it is as true, that if the breach had been assigned in non-payment of the £200 only, it would have been good; and therefore the averment that he has not paid one penny thereof, nor the average, is good. As to the second exception, there is no occasion to aver notice to the defendant, because the goods are alledged to have been delivered to himself (1).

As to third exception. It is not necessary to say always, that the writing was sealed and delivered, nor even to say it was a deed; the \*saying it was *scriptum obligatorium* has been held to be well enough (2); but here the words are, that this was an indenture made, which I shall understand to be the same as *scriptum factum*. But there is another question, Whether the matters here excepted to, especially the two last, are not merely form, and so helped by defendant's pleading over? for in this plea, *protestando* that the loading was not a complete loading, he says, that his factor offered to put on board goods sufficient, so that the ship might have a loading according to the form of the charter-party; why, does not that admit the charter-party? besides, where a party pleads over, he waives any defect in form: this goes a good way likewise to answering the objection to the assignment of the breach, for it approaches to an admission of non-payment; but I think the assignment

(1) See 8 T. R. 462. 1 *Jutw.* 421. 8 *East* R. 80.

(2) See 2 *Ld. Raym.* 1536.

assignment well enough, because of the words, "nor any penny thereof."

*Lee, J.* The reason of the difference in actions of *assumpsit* and on covenants is this, that where the party has agreed in terms, the plaintiff need only shew a breach of what he, under his hand, has agreed to perform; and it is a general rule, both in actions of covenant and debt upon covenant; that it is sufficient to shew a breach in the words of the covenant(1). In this case, the word covenant in the declaration makes it to import a deed, for a man cannot covenant without deed(2).

Judgment for plaintiff (3).

(1) See *Com. Dig. Pleader*, (C. 46), see 2 *Ld. Raym.* 1536. 2 *Str.* 814. 13 *East R.* 63. S. C. but not so full. It is however said, *Cro. Car.* 209, that in debt on bond

(2) 1 *Lutw.* 533, acc.

(3) In what terms the plaintiff declared does not appear; but as to where it is necessary to state the description of instrument declared upon, the omission of *per scriptum obligatorium* is aided after oyer by a plea *quod & olrit*.

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### JODDERELL *versus* COWELL.

**A**CTION upon a covenant in a lease to pay rent; and plaintiff assigns the breach in non-payment; defendant pleads, that before any rent became due, the defendant, with the assent of the lessor, assigned the premises to *A*, who, with the assent of the lessor, entered and paid the rent to lessor. To which plaintiff demurs.

*Lord Hardwicke, C. J.* This is a bad plea, for it is expressly contrary to the case of *Batchelor and Gage, Cro. Cha.* 188(4).

*Benny*, for defendant, then took exception to the declaration, for it is laid, that the indenture was made in *Middlesex*, and the lands lie in *Middlesex*, and yet the bill begins *London*, to wit.

2dly, For that here is no averment that the lessor has performed the covenants on his part.

\**Lord Hardwicke, C. J.* I think this is well enough; as to the mention of the county in the margin; that is not of importance if not referred to in the declaration, for the word *ss*, I verily believe, was not originally meant to the county, but only a denotation of each section or paragraph in the record; but now as it stands in this record, the declaration refers to the county in the margin, and therefore

Where the lessee in an action of covenant for rent pleaded, that with the consent of the lessor, he assigned the premises to another, who entered and paid him the rent, it was held bad on demurrer.

The venue in the margin varying from the description of the place in the declaration, unless referred to in the declaration, held well enough.

No averment of performance of covenants on the part of the plaintiff necessary.

(4) See also 3 *Mod.* 326. *Doug.* 461, appears the lessor had discharged the original lessee and brought his action against the assignee who was a beggar. 163, 764. 1 *T. R.* 510, 441. 3 *T. R.* 1221. And see 2 *Str.* 1221, where it

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therefore the word *London* must be left out, as being repugnant to the rest of the declaration, where there is a sufficient venue besides (1). As to the lessor's performance of his covenants, that lies on the defendant to shew (2).

Judgment for plaintiff.

(1) 1 *Taunt.* 379. 1 *Wms. Saund.* 308. (C. 20). 1 *Chitty on Pleading*, 279. 1  
n. 1. 3 *Wils.* 399. 3 *T. R.* 387. 2 *Bl.* *Tid.* 315, ed. 1812.

R. 847. *Bur.* 443. *Com. Dig. Pleader*, (2) See the authorities 1 *Wms. Saund.*  
235, n. (5).

### BLACKWOOD versus The SOUTH SEA COMPANY.

2 *Stra.* 1063.

The Court of  
K. B. do not re-  
quire that the  
return to a writ  
of error to the  
Court of C. P.  
returnable in  
K. B. be signed  
by the chief  
justice of C. P.

**WRIT** of error upon a judgment in the Common Pleas, which was directed as usual to Sir *R. Eyre*, Chief Justice, and is returned as usual likewise, viz. The answer of Sir *R. Eyre*, Chief Justice, within named; but the return not signed with the Chief Justice's hand, as the practice is always to do; and objected, that this is not a return, and therefore the proceedings are now regularly before the court. Upon this objection, the court took a day to consider, and then the sense of the court was given by

Lord *Hardwicke*, C.J. If this be considered as an objection taken upon the record, we have formerly determined, that there is no ground for such an exception, for that there is no law requires such a signing. There was no need for any name to appear in a return till the stat. of *York*, 12 E. II. c. 5: but that statute does not require, that the sheriff should sign it, but only that his name should be put with the return, so that the court may know of whom they took such return if need be; and therefore, as the cause now stands in the paper, this judgment must be affirmed. But to put an end to objections of this sort, we are of opinion that it is no objection in this court; though we are informed, that the court of Common Pleas require it should be done, but that it is only a matter of irregularity in that court, with which we have no more to do than we should have with any irregularity in obtaining a judgment there, when returned here to us upon record by writ of error; and, as we can take no notice of that, so here, the fact of the return is a matter entirely under the consideration of the court below; but as this matter stands now before us, it is a return in the name of the Chief Justice, and the record is properly before us.

Judgment affirmed (3).

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(3) Cited 2 *Tid.* 1125. See *Yelo.* 34. 1 *Salk.* 192:

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2 Str. 1055. S. C. [but not so full.]

**JUDGMENT** in debt in the Common Pleas by *non sum informatus* of Michaelmas term 8 Q. Anne, against one Langton. Trin. 3 & 4 G. II. *sci. fa.* against the two executors of said Langton, to revive the said judgment. One of the executors pleaded *ne unques executor*, and Street the other executor pleads that his testator in his life-time paid the debt and damages. Issue taken upon both those pleas, and a *ve. fa.* awarded for a jury to try both the issues; and after several continuances there was a verdict, finding that testator did not pay the debt and damages, and an award of execution, but no finding as to the other issue. Upon this a writ of error is brought in this court, and errors assigned *tam in redditione judicii*; as in the award of the execution upon the *sci. fa.* (1). Defendant in error pleads, That plaintiff ought not to have his writ of error, because not prosecuted within 20 years after entering the judgment according to the *stat.* 10 & 11 W. III. c. 24; and prays judgment if plaintiff shall maintain his writ of error; and as to the award of execution he pleads *in nullo est erratum*, and then prays, that as well the said judgment as the award of execution may be affirmed. To which plea there is a demurrer, and joinder in demurrer.

Serjeant Parker, for plaintiff in error. If we are in time, as they have not called on us to verify our errors, the want of original, &c. is confessed. So then the question is, Whether the statute of W. III. is well pleaded; and the conclusion of the plea is wrong; for it ought not to pray that the judgment be affirmed, but should pray that plaintiff be barred of his writ of error; as when a release of errors is pleaded, as in 1 Shower, 50, and Carth. 369. Then, as to the judgment upon the *sci. fa.* that is wrong too and must be reversed; for, if a verdict finds but part of the issue, it is a bad verdict. 1 Inst. 227. a, and 3 Salk. 372, Cattle and Andrews.

Serjeant Draper, for defendant. It appears upon this record sufficiently to the court by the teste of the writ of error, and the record of the original judgment, that there were above twenty years gone before the writ of error brought.

If there be a proper prayer in any part of the plea, the court will reject the improper conclusion as surplusage; so in the case of Downes and Emlyn, Trin. 19 G. I. and 1 G. II, defendant pleaded a release of errors, and concluded *unde petit judicium et quod in omnibus affirmetur*, and the same objection was made as is now made, and the \* court held the prayer of affirmance to be wrong; but, as there was there a prayer of judgment, they held the rest to be surplusage, and that they were bound to give the proper judgment upon the *petit judicium*; and they went upon the authority of Alford and Turner, Comberbach, 259, and Cross and Bilson, 1 Salk.

S: the

Where in *sci. fa.* against two executors, upon a judgment against their testator, one pleads *ne unques executor*, and the other payment by the testator, and a verdict is found for the plaintiff upon the first plea, and no finding as to the second, but judgment is entered, and execution awarded against both executors, and upon error brought upon such judgment, the defendant pleaded the statute of limitations in error, viz. 10 & 11 W. III. c. 24, the plea was allowed; and it was ruled that on such plea the judgment is, that the plaintiff may be barred of his writ of error: and held, that if an improper judgment be prayed, the court of error may give the proper judgment. But as to the award of execution, where no finding appeared, the court denied a *venire facias de novo*, on the ground that such writ could [\*346] not be awarded in error, and therefore reversed the judgment.

(1) See 2 Tid. 1106.

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S. the want of original, &c. is error in law, and error in law cannot be confessed.

As to the verdict upon one issue only, it resembles the case of *Croke and Ellis*. *Devastavit* as to one executor only returned, and held to be aided by the verdict.

But if the verdict is bad, we are entitled to have a new *venire facias*.

*Parker*, in reply, said, There may be a confession of any error in law which is extraneous to the record. To which Lord *Hardwicke* agreed.

Lord *Hardwicke*, C. J. This is in nature of a writ of error upon two judgments, and, therefore, one of these judgments may be reversed, and the other affirmed (1); or the writ of error may be barred as to one of the judgments, and the other may be reversed: for this proceeding not being an action, but a commission to examine errors, it is to be applied to each judgment, according to the nature of each case (2).

As to the 1st judgment, errors are assigned, and the statute of limitations pleaded, and it is no answer to say, that it appears upon the face of the record, That the judgment is above 20 years standing, for it must be pleaded as well as other statutes of limitations, because there is a saving of rights of the persons mentioned in the act; as infancy, &c. which may be replied to take off the effect of the plea; and therefore the court cannot take notice of it merely as it appears upon the record itself. But, here it is pleaded, and the question is then, Whether rightly pleaded, the plea concluding with a prayer that judgment be affirmed. I think it ought to be pleaded in the same manner as a release of errors, and pray that the plaintiff may be barred of his writ of error, for the statute does not intend to direct the court to affirm an erroneous judgment, but only that after 20 years a judgment shall not be reversed for error, which should be construed according to the common law, that the plaintiff after that time be barred of this writ of error (3). If that be the proper conclusion, then is this plea taken altogether sufficient, and I think it is well enough; for though it is true that *conclusio facit placitum*; and therefore if the plea begins in abatement and \*concludes in bar, it is a discontinuance; yet as in the case of *Cross and Bilson* (4), if there be once a proper prayer of judgment, the rest will be rejected as surplusage; now here the plea is, That plaintiff ought not to have his writ of error, because, &c. and then prays judgment if he shall have his writ; and then it goes on, that there is no error in the award of the execution, and then prays the judgment may be affirmed; whereas it should have prayed only, that the award of execution be affirmed, which is repugnant to the other prayer; therefore I think we should give judgment, that plaintiff be barred of his writ of error as to the 1st part (5).

Then

(1) See *Bac. Abr.* 229, cited 2 *Tid.* 1152.

(2) 2 *Bac. Abr.* 187. 1 *Str.* 607. 2 *Ld. Raym.* 1043, S. C. 2 *Tid.* 1092.

(3) Cited 2 *Tid.* 1151.

(4) 1 *Salk.* 3.

(5) Cited *arguendo*, 6 T. R. 209. 2 *Tid.* 1151.

Then as to the other. Here are two executors, one pleads *ne unques executor*, and the other pleads payment by testator; upon both which, issue is taken; and a *venire* to try both; but a verdict given as to the first issue only: I think the verdict is imperfect, and would be a *Jeofail*, and if it had come before the court in arrest of judgment, they must have awarded a *ve. fa. de novo*; but, being before us by writ of error upon the judgment, it must be reversed: so *Yelv.* 106. *Drury and Dennis*, and 2 *Roll. Abr.* 722. *pl.* 13. As to the case of the *devastavit*, that does not come up to this at all; for there was a verdict upon issue subsequent; but here the defect is in the verdict itself, and it has been often determined, that a bad verdict will not help itself. But there is another answer, that a *devastavit* is to affect the executors personally; and therefore they may be severally proceeded against, but here it remains undetermined for want of trying the first issue, Whether one of the persons was executor or not. Upon the confession of the other, as his plea is found against him, judgment must be against both. As to the *ve. fa.* I can find no case where it has been awarded upon a writ of error; and it would be little inconsistent; for that would be for us to continue and transfer the proceedings into this court. Therefore I think, as to the award of execution, judgment ought to be reversed, and that we cannot award a *venire de novo*.

*Page, J.* If we were to issue a *ve. fa.* all the proceedings thereupon must be in this court, and so there might happen to be a verdict recorded here, contrary to one in the Common Pleas in the same cause.

*Lee, J.* Here is a right prayer of judgment in this plea, for he has first prayed that the plaintiff in error be barred; though he goes on, afterwards, to pray that judgment may be affirmed; but that is repugnant and cannot be if the writ of error is barred; for, thereby, the proceeding is out of court, and, therefore, it must be rejected. I take it that where there are several issues joined, the jury are bound to give a verdict upon all the issues, or, else it is error; and in \*1 *Roll. Abr.* 802. tit. *Error*, there are numberless instances put thereof; and says *Roll. ib. pl.* 4; The jury must inquire of all the issues joined, otherwise they do not perform the command of the *ve. fa.*

*Per Cur'*, Judgment, that plaintiff be barred of writ of error upon the first judgment, but the award of execution upon the *sci. fa.* must be reversed (1).

(1) That the court had not power to award a *venire facias de novo* in error, seems very questionable. See the cases where that writ has been awarded in error, one of which, viz. 2 *Str.* 1151, 1153, was decided in the Trinity term immediately preceding the present case. See 2 *Str.* 1124. 1 *Cook B.L.* 166. 1 *T.R.* 723. 5 *T. R.* 367. In these cases the writ was directed in *Dom. Pro.* to be awarded by *K. B.* In the following cases *K. B.* awarded the *venire facias de novo*, upon judgment removed from *C. P.* to *K. B.* by writ of error, viz.

1 *Cowp.* 89, 91. *Doug.* 722, 730. 3 *T. R.* 37. See also 1 *T. R.* 528, n. (b). The principle upon which the *venire facias de novo* in error, has been denied, does not seem even lately to have been thoroughly recognized, for in one case it was refused on the ground that the proceedings upon which error was brought, originated in an inferior court, 1 *T. R.* 151, but soon after error was brought on an action, originating in the court of Great Sessions in Wales, and a *venire de novo* was awarded, 2 *T. R.* 125. See also 2 *H. Bl.* 211. 2 *New Rep.* 328, 9.

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WICKHAM *versus* HOBART.

2 Stra. 1065. 4 Bac. Abr. title Privilege. (C) 2. [S. C.]

An attorney, although steward to a peer, has no privilege of parliament.

IT was moved, that the sheriff should return his writ of *ca. sa.* and without shewing cause to that rule, the sheriff moved that it might be discharged upon an affidavit that he did take the defendant in execution, but has since discharged him upon receiving a letter from Lord *Say and Seale*, testifying that the defendant is his Lordship's menial servant, and therefore privileged by him.

*Strange* for plaintiff. This ought not to be allowed upon motion, but the sheriff ought to make a return upon record, that we may be able to litigate either the matter of fact or law, upon record. But, however, as to the excuse that is made, he insists that the defendant is not entitled to privilege. And for that purpose he produced an order of the House of Lords of 24th *March*, 1696, which says, That no common attorney or solicitor, though employed by any peer or lord of that house shall be allowed privilege of parliament, which was read. That the present defendant is an attorney of this court, admitted 24th *December*, 1730, and now standing on record as appeared by the Master's certificate. Then he read another order in the house of Lords of the 28th *May*, 1624, amended by order 22d *June*, 1715, declaring how far the privilege of the nobility doth extend concerning the freedom of their servants and followers from arrests; and the order declares it to extend to all their menial servants and those of their family, as also those necessarily and properly employed about their estates as well as their persons.

On the other side it was said, That this matter cannot be returned, for which was cited 1 *Sid.* 243, *The King v. Percival*, where a return to a *distringas jur'*, that the citizens of *Canterbury* were exempt from serving juries, was held to be not returnable, and therefore this may be determined on motion.

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Lord *Hardwicke*, C. J. In this case here is an execution regularly issued upon a judgment, and upon the face of the writ no privilege \*appeared. If the *ca. sa.* had issued against a peer, it would appear from the writ he was privileged in his person, therefore, now the evidence of the privilege arises *dehors* the writ, and the party has a right to some return or other, the sheriff must make what return he thinks proper, and then it will be considered if it is a good return. But, supposing we were to enter into the merits, it does not appear, even, from the representation now made, what kind of servant the defendant is. And there is a standing order of the house, that no written protection shall be good; but it does appear that he is an attorney, and I should think the order, in the reason of it, extends not to attorneys any ways employed; because they are public officers, liable to the controul of the court for misbehaviour, and

and privilege might hinder the court from compelling them to behave well or to do justice to their clients. Besides, there is here no affidavit that he is employed even as a menial servant, for it is only said in the affidavit, that he finds upon enquiry he is a steward; now for that alone without being a menial servant there will be no colour to allow him privilege.

*Per Cur'*, Rule discharged, and the sheriff put to make return (1).

(1) Although the servants of peers necessarily employed about their persons and estates could not, as may be gathered from this case, and also from *Wils.* 27<sup>b</sup>, be arrested, yet this privilege seems to have been first curtailed by several statutes, viz. 12 & 13 W. III. c. 3, 11 Geo. II. c. 24, and afterwards taken away by 19 Geo. III. c. 50. See 5 T. R. 687.

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WICKHAM  
versus  
HOBART.

### HARRIS versus SHAW.

At the Sitings in *London* after Term.

**T**ROVER for 4000 yards of *Persian* silk. Upon not guilty pleaded; the case upon plaintiff's evidence was, That plaintiff had lost out of his shop a very great quantity of *Persian*; and that *West* his journeyman had defrauded him of it, he having been seen to take *Persian*. That *West* carried this *Persian* (which when it came into the shop had the weaver's mark, but when he carried it some had the mark cut off) to one *Curtis* a broker to sell for him to whom he could. That *Curtis* had often sold goods for him as well before he was journeyman to plaintiff as afterwards, and as well *Persians* as other silks. That *Curtis* sold the quantity in the declaration, some with marks and some without, to the defendant in the day-time in his shop, which is not in *London*, but behind *St. Clement's* church in the *Strand*, at a market price for ready money. That the defendant knew not whose the goods were, and that it is customary for mercers as the defendant is, to buy goods of brokers in that manner.

\*Hereupon two questions arose, 1st, Whether taking this as a buying in defendant, feloniously, of goods stolen knowing them to be so; and then whether this action can be maintained without prosecuting the defendant. And as to that, this distinction was made by plaintiff's counsel, That if goods be stolen, and not waived in flight, nor seized by some of the King's officers as suspected to be stolen, there the party robbed may take his goods again, or bring an action for them, though he doth not prosecute. But if the goods be waived by the felon in his flight, or in case they be not waived, yet if they be seized by any of the King's officers as suspected to be stolen, there the party shall not have restitution unless

In trover for stolen goods, the plaintiff must identify them to be those stolen from him.

If the party know that he has been robbed of the goods, he must, in order to obtain restitution [under the statute 21 H. VIII.] first prosecute the felon.

By the custom of *London* every man's shop is a market overt, and a

*bond* [\*350] *fide* sale therein of stolen goods without notice, divests the original owner of his property therein; *aliter* if the shop be not in *London*.

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unless the thief be convicted at his prosecution; for which they cited *Kelynge, fo. 48.*

[Lord *Hardwicke*, C. J. I take the law to be as you say, if the party does not know there is a felony committed, but if he does know it he must prosecute.]

But however, that was not insisted on, because there was no evidence of any thing but a fair transaction in the defendant, and plaintiff did not pretend to charge him or suspect him of any thing criminal; therefore plaintiff's counsel insisted, 2dly, That the property of these goods could not be transferred from plaintiff to defendant without a fair sale in market overt, and the place where these were sold is not so; for though every man's shop in *London* is by the custom a market overt for what he deals in, yet this shop is not in *London*.

Lord *Hardwicke*, C. J. There is in this case no sort of reason to suspect that defendant dealt unfairly; the only question is, Whether the property of these goods be altered? For if the property of them appears to have been once in the plaintiff and not deusted, plaintiff must recover. It is true, the goods were not sold in *London*, where every shop is a market overt by the custom, and a sale there by the custom will alter the property; and though that custom does not extend out of *London*, yet even out of *London* great allowances should be made analogous to the custom there, in cases where the transaction has been fair; and therefore when in such a case a defendant is to be put to pay over again, the plaintiff should be required to prove his case in the strictest manner. Now here the plaintiff's evidence is, that it is very probable plaintiff has been wronged by *West*, but then the question is, Whether the very identical goods now in question, are the very goods taken from him? And that is very far from being clear, and therefore it cannot be said that the property of the goods bought by defendant is in the plaintiff. If it had appeared that the defendant had known these goods came \*from *West*, and whose journeyman he was, less evidence might have served; but here the very contrary appears, and that the dealing on defendant's side was very fair (1).

Plaintiff nonsuit.

(1) The point upon which this determination hinged, is by no means clear. It does not appear that the thief was prosecuted, and therefore it is probable this action was brought without any reference to the statute 21 H. VIII. c. 11. See cases of trover for property stolen, 2 T. R. 750. 5 T. R. 175. 3 Bulstr. 310. Cro. Eliz. 661. Kel. 48. Left. 88. And as to the writ of

restitution given by the statute 21 H. VIII. c. 11, see Left. 90. et seq. By the case in 2 T. R. 750, it appears that trover for restitution after conviction of the felon, can only be maintained against the person in possession of the goods at the time of the conviction, and not against a person who purchases them in market overt, and sold them again before such conviction.

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## HILARY TERM,

10 Geo. II. 1736. B. R.

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PHILIP Lord HARDWICKE, Lord Chief Justice.

Sir FRANCIS PAGE, Knt.

Sir EDMUND PROBYN, Knt. } Justices.

WILLIAM LEE, Esq.

JOHN WILLES, Esq. Attorney-general.

JOHN STRANGE, Esq. Solicitor-general.

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GOODRIGHT *versus* HUGOSON.

SERJEANT *Parker*, for plaintiff in error, moved to set aside a *sci. fa. quare executionem non* tested the last day of last term, and returnable the first day of this term, because there is no transcript of the record below yet returned, and therefore there can be no ground for the suggestion of the writ, which is, that judgment was given below *sicut per inspectionem recordi quod coram nob' ven' fecimus constat de recordo*, and he cites a case of *Eden* and *Wills*, *Hil. 12 Geo. I.* † where such a *sci. fa.* was set aside for the same reason.

*Scire facias quare executionem non* cannot be maintained before a rule to transcribe be given, and the transcript returned thereon.

\*Lord *Hardwicke*, C. J. The practice is, that if the plaintiff in error is dilatory, the defendant must give a rule to transcribe, and then if he will not, the defendant may *non pros* the writ of error.

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Court inclined the *sci. fa.* is not maintainable, but made no rule to shew cause, because the defendant in error, rather than be delayed, consented it should be set aside.

COMBES

† 2 *Ld. Raym.* 1417. *Stra.* 694. S. C.

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COMBES *versus* COLE.

Where the avowant in replevin obtains a verdict and the value is subsequently ascertained by inquiry, under stat. 17 C. II. c. 7, he cannot proceed against the sheriff for the purpose of compelling him to deliver up the replevin bond in order to sue the sureties thereon; but ruled that the avowant must either pursue the stat. of C. II. c. 7. or the old remedy under stat. *Westm.* 2. c. 2.

**R**EPLEVIN in the county court, and removed hither by *re-cordari*, and a verdict for the avowant, and an inquiry as to the value, pursuant to stat. 17 C. II. c. 7.

Serjeant *Agar*, in behalf of the avowant, moved that the late sheriff of *Middlesex* might deliver up the replevin bond (which is usually entered into by plaintiff in replevin to the sheriff) to the avowant in order for him to sue the parties in that bond, the plaintiff himself being run away.

Serjeant *Draper*, for the sheriff shews cause, For that this is only a private security taken by the sheriff, and in fact is lost, and the avowant has another remedy; for these sureties to the sheriff are taken to enable him to comply with the statute of *Westminster* 2. c. 2. which directs, that before the sheriff delivers the goods replevied, he shall not only take pledges to prosecute, but likewise for return of the goods, if a return should be awarded; and the remedy for the avowant upon that statute has been; that if upon the *retorno habendo* the sheriff return *averia elongata*, the plaintiff may have a writ to have return of the beasts of the pledges, and if upon that writ the sheriff return *nihil*, the plaintiff may have a *sci. fa.* against the sheriff *quod reddat ei tot averia, or tot catalla*, 2 *Inst.* 340; and, that remedy by *sci. fa.* was taken in the case of *Gates* and *Binkford*.

Lord *Hardwicke*, C. J. The avowant must either pursue the remedy given by the stat. 17 C. II. c. 7. which is, to have judgment and execution for the particular sum settled by the jury, or, else he must take the ancient remedy: but now the avowant would have us to proceed in a manner not directed by the statute, by obliging the sheriff to deliver up the bond that he may bring an action in his name; but I do not remember one instance of that being done; but if you proceed against the sheriff, it must be in the way *Draper* \*mentioned; and that method was taken likewise in the case of *Mulso* and *Shee* (1).

*Per Cur'*, Rule for shewing cause discharged (2).

(1) *Fortesc.* 330.

(2) But now by stat. 11 G. II. c. 19. the sheriff is ordered, at the request and costs of the avowant or person making consance, to make an assignment of the replevin bond; and the avowant,

without joining the party making consance, may take this assignment, and bring an action thereon. See *Archer v. Dudley*, 1 *Bos. & Pul.* 381. n. (a).

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## MOORE and the MAYOR, &amp;c. of HASTINGS.

[2 Str. 1070. S. C. but not so full.]

*The Opinion of the Court.*

**L**ORD *Hardwicke*, C. J. *Mandamus* to the defendants to swear in the plaintiff a freeman of that borough, suggesting that, time out of mind, there has been a custom in that borough, That every person, being the son of a freeman, and born after his father's being sworn, hath a right upon payment of a reasonable fine to be admitted a freeman. The return made to this writ is a traverse of the custom, and issue joined upon the custom; and this issue was tried before me; and the evidence proved the right suggested, to the satisfaction of the jury; but as to the fine, the evidence was, That the sum of 6s. 8d. had been always paid for a fine; and, objection was made that the words "reasonable fine," imported a variable one, and that, therefore, the custom not proved as it was laid: and that point was saved for the opinion of the court, and a verdict taken for the plaintiff, subject to that opinion.

Proof of payment of a certain fine is sufficient proof of a custom to pay a reasonable fine.

The question is, therefore, Whether this evidence of a constant payment of 6s. 8d. proves the custom laid in the writ, and that depends on the question, Whether the word "reasonable" when applied to a fine, necessarily imports an uncertain sum, or, is not made use of in the same sense as in common parlance; and if it must be taken to have a determined sense, then this custom is not proved.

Now no case was cited to shew the meaning of this word when applied to fines paid to corporations: but only from its use when applied to fines paid by copyholders; and as to them, it was said, the settled difference is between fines certain and fines reasonable. *Co. Lit.* 59. b. But we think that this objection admits of two answers; 1st, Supposing the words "uncertain" and "reasonable," when applied to copyhold fines are synonymous, yet they do not agree with fines paid to corporations throughout; for, in copyholds, the yearly value of the land may be a measure to the court to settle the fine; but, in the other case, there is no rule to guide the court, or the jury, but the custom of the place; therefore, here, the word "fine" is used in an improper sense, and the thing meant, is a reasonable sum of money.

\*2dly The proper division of fines is not of fines certain and reasonable, but of fines certain and arbitrary; nor, does *Coke* so distinguish them; but his distinction is of fines certain and uncertain; and these words are properly opposed to one another, which the words certain and reasonable are not. But yet if the fine is uncertain, it must have the quality of being reasonable; and *Coke* in p. 62, of his copyholder, puts the distinction of certain and un-

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certain,

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certain, and does not mention the word "reasonable" at all; and, upon this ground the case of *Denny and Leman*, *Hob.* 135, stood, That the fine is arbitrary, and it must come from the tenant, as an excuse for non-payment, if it be unreasonable. So 1 *Keb.* 154. 1 *Sid.* 58. *T. Raym.* 41. [S. C.] shew, that it is not of the essence of fines; for then the Lord must have averred them to be reasonable; and agreeable to this is the general run of the declaration in actions of debt brought by the Lord for his fine; for, in them there is no averment that the fine is reasonable; a precedent of which there is in *Lutw.* 597, and there has been no authority mentioned to prove, that a reasonable fine means an uncertain one, but that instance as to copyhold fines, to which a sufficient answer has been given, but on the other side it was shewn, that the word "reasonable" is often used where the sum demanded is certain: as in the case of *Aid pur faire fitz Chevalier or pur file Marier*, they are limited to certain sums by the *stat. Westm.* 1. c. 31. 2 *Inst.* 251: and yet the demand in the writ is *pro rationabil' auxilio*. So, likewise, in the writ *de rationabili parte honor'* the share is certain, as a half, or quarter, &c. So, likewise, in dower *unde nihil habet*, the writ demands *rationabilem dotem*; and yet the dower is certain, as a third, &c. To this it was answered, That though the writs were thus general, yet the counts upon those writs must be particular, and here the *mandamus* is of itself instead of a declaration; and it is true, that in all these cases, as appears by *Rastall's* entries, the counts are particular, but still it proves that the word "reasonable," is in law consistent with a sum certain. Whether the *mandamus* has described the fine itself with proper certainty? is not now the question, but whether the allegation in the writ is proved by the evidence given? The addition of the word "reasonable" is no more than the law would have implied, if the word fine had been only used; and if that had been the case, to be sure the evidence of 6s. 8d. paid, would maintain it. When *A.* makes an unnecessary averment, it may bind him to prove it at the trial; but, if he proves it, it can never hurt him.

Per Cur', The *Postea* must be delivered to the plaintiff (1).

(1) See 362, *post*.

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* The KING *versus* INHABITANTS of GLASTONBY.

2 *Str.* 1069, [3. C. but not so full.]

In proceedings upon a writ of *noctanter*, the court cannot give costs.

LORD Hardwicke, C. J. This is a proceeding upon the *stat. Westm.* 2. [13 E. I.] c. 46. called a *Noctanter*; the proceedings herein were, First an original writ to the sheriff to enquire who

who threw down the hedges of *J. S.* in the night time, or at such time as they thought it would not be known, and then goes on, as an original writ in trespass, That if *J. S. fecerit securum*, &c. he should attach the persons guilty to answer as well to the King for the breach of the peace, as to the said *J. S.* for the said trespass, and hereupon the sheriff returned an inquisition which found that the said hedges were thrown down in the night time by persons unknown. The next process was a *distringas*, reciting the above writ and return, and commanding the sheriff to distrain the next adjoining villages to set up again the said hedges at their own costs, and also commanding him to enquire what damages the said *J. S.* had sustained in this matter, and to restore the same to the said *J. S.* The sheriff returns an inquisition, finding that *J. S.* had sustained damages to £100, but that the writ came *tardè*, so that he could not restore the damages to *J. S.* hereupon was awarded an *alias distringas* to set up the hedges and restore the damages as before. Then *R. C.* and in the name of all the inhabitants of *Glostonby* come in and pray an imparlance, and then plead both to the repair of the fences, and to the damages. As to the repair of the said fences that *R. C.* was seised of the place where in fee, and that the fences were erected in his soil *ad nocumentum suum*, and therefore he pulled them down. And as to the damages, they plead that the said *J. S.* did not sustain damages to above 10s. and hereupon issue was joined as well by the King's coroner, as by the prosecutor: and the jury found that the said *J. S.* sustained damages to £7. 10s. besides costs(1). And upon this a motion was made that the court would grant costs *de incremento*.

But we are all of opinion, That we cannot give costs upon this proceeding, for we can find no such judgment given upon this statute ever since it was made. The only case where it was ever asked in this case, is in *Carthew* 239, 242, but the court then gave no opinion(2); in the books of entries there is no instance of such a judgment. And in the entry of a proceeding of this sort which is in *Lutw.* 141, and 155, which appears to have been very well considered by the ablest hands, and where the writ of execution was corrected by the Lord Chief Justice *Holt* himself, there is no judgment for costs; indeed in that case the traverse was not taken upon the damages, but upon the writ only, but that will not vary the case at all; for if the prosecutor had been entitled to costs at all, he ought as well to have had his costs upon these traverses, as if the traverse had been upon the damages.

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(1) For other instances of proceeding by this writ, see *Cro. Car.* 280. *id.* 439. *Id.* 580. *Roll. P.* 365. See also 1 *Lutw.* 141. 1 *Str.* 622. *Bull. N. P.* 217.

(2) It has been observed that it was unnecessary for the court to give any

opinion as to costs in that case; as the parties had entered into a rule by consent, that each of them should pay their own costs, by which they were held to be concluded. 1 *Hul.* 18. marg.

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But it was said that the prosecutor in this case is entitled to his costs by virtue of the statute of *Glocester*, c. 1; the words of which statute are, that the demandant shall recover against the tenant the costs of his writ purchased, together with his damages. Now the construction upon that statute is, that costs shall be recovered in such cases only where there is a plaintiff or defendant, or a demandant or tenant: but this case is entirely a traverse of an inquisition, and was so held, 1 *Sid.* 212, and 1 *Keble*, 741.

It was likewise said, that this proceeding is in nature of an action, and similar to the action upon the statute of *Hue and Cry*; and, likewise there is in this case an original writ purchased; but here the original writ is not sued out against the inhabitants of the *Villa*, but against the malefactors only, and if the sheriff had returned the malefactors, there would be then a formed action against them, and the plaintiff would be entitled to his costs. But when there is a *non invent'* returned as to the malefactors, which is this case, and the inhabitants are brought not as parties to the writ, but collaterally only, upon the traverse of the inquisition, that distinguishes this from an action upon the statute of *Hue and Cry*; for there the inhabitants are properly defendants, being parties to the original writ. It is said indeed in 1 *Roll. Rep.* 365, to be laid down by Lord Coke, That the party might have an action against the inhabitants upon this statute, as well as upon the statute of *Hue and Cry*; but be that as it will, the remedy is not in fact taken by way of action; and no one has yet tried such an action as Lord Coke there speaks of; for the remedy hitherto taken has been always in the manner of this proceeding, which has obtained the name of a *Noctanter*.

An argument was likewise drawn from the *stat. 1 Geo. I. stat. 2. c. 48* (1), which enacts, That if any person maliciously cuts up trees, &c. the person damaged shall have satisfaction from the parish, and damages and costs, to be recovered against the parish in like manner as [is directed for] hedges [overthrown] are to be levied upon the statute now in question, and damages yielded; from whence it was inferred that the opinion of the legislature then was, that costs ought to be recovered upon this statute; but the words of the statute shew the contrary; for, though it directs damages and costs to be recovered in the case there provided against, yet when it refers to the statute of *Westminster*, the word costs is dropped; therefore if any thing can be inferred, it is *that costs were not to be recovered by that statute. It must be allowed it is reasonable the prosecutor should have costs, but that will not warrant us to do it without the direction of an act of parliament; and the rule settled and always adhered to is, that statutes which give costs are to be taken strictly; and so is 1 *Salk.* 205. *Cone and Bowles* (2).

STONE

(1) Explained and amended by *stat. 6 Geo. I. c. 16.*

(2) Neither does the *stat. 29 G. II. c. 39. s. 6.* passed long after this decision, and which section relates to cut-

ting up trees, &c. give other than the damages recoverable under the statute of *Westminster 2. c. 46.* to which it also refers. See 11 *East* 349, where it was held, that an action on the case lies upon

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STONE *versus* HARWOOD.

RYDER, Attorney-General, moved for a prohibition to stay a suit in the consistory court of *London* for tithes. The libel was for tithes due from the occupier of the land, and the suggestion here upon the roll is, that this land belonged to the Abbot of *Westminster*, and was held tithe free, and came into the hands of the crown, under whom the plaintiff holds it as tenant at will. He admits this matter is not pleaded below, but prays a prohibition because the plea cannot be tried there, and because a traverse that such a plea was refused would be a bad traverse, as was held in the *Bishop of Winchester's* case, 2 Co. 45, a; and, therefore, he would infer there is no occasion to plead it below. But

Prohibition to the Spiritual court refused, till the special matter were pleaded there.

Per Cur', This is but the case of every *modus*; for, though the spiritual court cannot try the *modus*, yet it must be pleaded there before you can have a prohibition, and it is not said in the *Bishop of Winchester's* case, that it used not to be pleaded. It is the course of the court, that it must be pleaded before you can have a prohibition.

upon the statute 6 Geo. I. c. 16. s. 1. by the party grieved, to recover damages against the inhabitants of the adjoining township, for trees, coppice, and underwood, unlawfully and feloniously burnt by persons unknown; though the clause directs the party grieved to re-

cover his damages in the same manner and form as given by the statute 13 Edw. I. st. 1. c. 46. for dikes and hedges overthrown by persons in the night; upon which the usual course of proceeding has been by the writ of *noctanter*.

PARSONS *versus* COWARD.

IN an action of debt upon bond. Defendant pleads, that after making the bond, the plaintiff's testator by her last will and testament, sealed with her seal, did release the said bond. To which plea plaintiff demurred, and in support of the demurrer were cited *Styler*, 286, *Styler v. Tullye*, and 1 *Sid.* 421, *Pidgeon v. Harrison*, which are in point.

A release by will cannot be pleaded to a bond debt. Query, Why?

Per Cur', There is nothing in it, judgment must be for the plaintiff (1).

(1) This *placitum*, with the *querre* subjoined thereto, remain unaltered; but to the *querre* it may be answered, that, without the money due on the bond, there might not be assets to pay debts, and then the bequest, without the consent of the executor, is bad; but *Siderfin* makes a *querre* as to what asset is requisite. See *Sid.* 422. Perhaps such release by will may be con-

sidered only as a bequest of a legacy, in which point of view the above observation may be deemed applicable. See *Styler*, 286. But it seems that equity would decree the bond to be delivered up to be cancelled, 3 *Atk.* 580, i. e. against executors, but not against creditors. *Id. ib.* See also 1 *Cox's P. W.* 86, n. 2. 1 *Ves.* 49.

TOTTAGE

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TOTTAGE *versus* PETTY.

To an action for an assault and battery, *molliter manus imposit* may be pleaded to the battery.

ACTION of assault for several batteries and woundings; defendant as to the wounding pleads not guilty; and, as to the battery, he justifies, that the plaintiff entered his house without his leave, and there disturbed him, and because he would not go out, defendant *molliter manus imposuit* on him, which he avers is the same battery; to this plea the plaintiff demurs.

Benny, for plaintiff, excepts to the plea, that it is bad, because it has not only justified the assault but the battery, which he cannot do, as he would infer from the case of *Williams and Jones, Trin.* last †. He excepts likewise to the plea as bad, because it does not shew that the plaintiff refused to go out of his house.

Lord *Hardwicke*, C. J. It is laid, that because he would not go out, therefore, &c. which is a good averment. As to the case of *Williams and Jones*, there the defendant justified a battery by a bare arrest: and the question was, Whether he should not have shewn either a *molliter manus*, or that he having arrested the plaintiff, did the battery in his own defence, but it was not determined by us, that a battery could not be justified by a *molliter manus*, but that it could not be justified by an arrest.

Per Cur', Judgment for defendant (1).

† *Ante*, 298.

(1) Further as to the plea of *molliter manus imposuit*, see *Com. Dig. Pleader*, for striking the plaintiff repeated blows, and with great force and violence several times knocking her down. (3 M. 16, 17). But see also 8 T. R. 299, where this plea was held no answer to a charge against the defendant.

The KING *versus* BRAY.

The objection, on the ground of interest, to an elisor named with another to return a jury of freemen, who are to elect a mayor of a corporation, being a witness in a cause wherein the mayor elected was defendant, goes to credit but not to competency.

So also as to one of such jury who had so elected the defendant, the mayor.

INFORMATION against the defendant *quo warranto* he acted as mayor of *Tantagin* in *Cornwall*: the defendant pleaded a custom, That at the court leet for electing a mayor, the former mayor is to nominate one elisor, and the town clerk another, or in the case of the absence or refusal of the town clerk, the mayor is to nominate two elisors, which elisors are to return a jury of freemen, who are to elect a new mayor; and upon the trial of this issue,

issue, one *P. H.* was produced as a witness for the defendant, but objected to as an incompetent witness, and rejected as such by Mr. Baron *Thompson*, who tried the cause at the assizes, he being one of the elisors named by the former mayor to return the jury; and one *J. H.* was likewise rejected as an incompetent witness, he being one of the same jury, by which jury the defendant was named as mayor. And thereupon, without examination of any witness for the defendant, a verdict was given against him.

*But the court was now moved for a new trial: 1st, As this was a misdirection of the judge of assize; and 2dly, Because the merits did not come in question.

And many cases were cited *pro* and *con*, and the court took a day to consider, and then were unanimous of opinion that there ought to be a new trial.

Lord *Hardwicke*, C. J. It is proper to consider the cases of these two witnesses severally, for the objection is the strongest against *P. H.* the elisor; and with regard to him it consists of two parts; 1st, that he is interested in the event of the cause, because his authority arose under the custom, which he was produced to prove. 2dly, That if there was no such custom, then the mayor had no authority to nominate him, and that therefore he was liable to an information *quo warranto*. The general question which arises from these two objections is, whether it appears he was interested in the event of this suit. There have been variety of opinions as to what shall go to the competency, and what to the credit of a witness, and I think it is impossible to reconcile all the cases; most of them have happened at *Nisi prius*, where points have not so much consideration, as in court, and in some of the boundaries set between what goes to competency, and what to credit, are extremely nice; and I believe there have been many, where when a judge has seen a witness inclined to be partial, he has carried the incompetency further than he could be warranted; and so was the case of the *King* and *Whiting*, 1 *Salk.* 283, where in an information for a cheat in drawing in a person by slight to set her hand to a promissory note, Lord *Holt* repelled the testimony of the person supposed to be cheated, because though the verdict in that information could not be given in evidence upon an action for the note, yet he said we shall be sure to hear of it to influence the jury, &c. and yet, if that were examined into, it would be found to be rather an objection to the credit than the competency; nevertheless that has been followed ever since. The true notion of this matter may be gathered from the question which is asked upon a *voir dire*, viz. Whether the witness is to get or lose by the event of this suit, for if he can answer that fully he must be a witness: and therefore there is a distinction between what will take away the competency of a witness, and what is matter of challenge to a juror, because a juror must stand absolutely indifferent as he stands unsworn, but a witness need not be so; and the reason is, because you may make the objection to his credit,

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but if a juror be once sworn, he stands equally a juror with the rest: the question is therefore, whether the matter here objected to this witness, goes to his competency or to his credit only, and I am of opinion it goes only to his credit; for the authority under which he claims was over *long ago; it was not an office, but merely an authority, for it is no more than an *elisor* nominated by a court of justice, to return a jury to try a cause when there is some defect in the sheriff or coroner: and I know no instance where a man by having a bare authority, which gives him no interest, will be hindered from being a witness, if he is not a party in the cause; and so a bailiff who has executed a writ may be a witness, if he is not a party, but an office is always an interest. Then, as to the objection, that he was liable to an information *quo warranto*; that seems to me to be more immaterial than the other; for I do not know that it has ever been ruled, that because a man is liable to an information for a past fact, that there his testimony is to be refused; if we should allow of such doctrine, it would go too far; for it is daily experience, that persons who have executed an office in corporations, when that office has afterwards been called in question, have been allowed as witnesses, to prove, if it depends upon custom, what was usually done; and yet they are liable to informations *quo warranto*, if the custom should not warrant the office; and those are commonly the best witnesses in such cases. Therefore, if we should allow that the person whose office is over, ought not to be a witness, because liable to such an information, it would be a great damage to many corporations; nay, it would go further; for at that rate, if an information were brought for an act done at a corporate assembly, and the persons there present could be no witnesses, there then could be no witnesses at all. The case in 2 *Roll. Abr.* 685, *pl.* 3, which is cited by Lord Hale in his *Hist. Plac. Coron.* 2 *F.* p. 280, is full as strong as this, and went only to the credit of the witness. The case of *Chumpian and Atkinson*, in 3 *Keble*, 90, upon the reason of it, is something material in the present case; for the question was, whether a fine was due to the lord during his minority upon the tenant's admission, and the steward was allowed to be a witness for the infant lord, though it was objected to him, that he was entitled to a fee on admission, which he would lose if not admitted; therefore, upon the authority of this case, and the reason of the thing, I am of opinion that the objection in the present case goes only to the credit of the witness. As to the objections as made to the other witness who was one of the jury, they are still weaker than the other case.

For my own part, whenever an objection of this sort is made at *Nisi prius* before me, I am always inclined to restrain it to the credit, rather than to the competency of the witness, unless it is like to introduce great perjury; because it tends to let in light to the cause, and there may be still an objection made to his competency. Therefore I think there must be a new trial.

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**Lee, J.* The distinction between jurors and witnesses is established by the 1 *Inst.* 6, *b.* and that what has the appearance of a consequential

consequential benefit, shall not repel a witness's testimony. The same doctrine is in *Hale's P. C.* 280. As to the objection, that this witness, being an elisor, has a franchise in him, it is not so; for he has thereby no interest or franchise, but only an authority. But the force of the objection is, That they are liable to a prosecution: but when there is any doubt about admitting a witness, it must be determined by the nature and circumstances of the case then before the court. In the case of *The King v. Huggins*, which may be found in *Fitz-Gibbon's Rep.* 80, pl. 7, in an action of escape against the warden of the *Fleet*, the escaper was admitted a witness, because the verdict could not afterwards be made use of. There is likewise a case of the *King and Clark, Hil. 13 Will. III.* [11 *Mod.* 615,] which was an information against the defendant for building in the river *Thames* to the obstruction of the navigation: and the person who was particularly hurt by the nuisance was produced and admitted a witness. The question is, Whether it would not disable a court of justice from proceeding in enquiries of this kind, if such evidence be refused; for as no time is limited for these informations, it may be objected, that the witness is liable to one though his office had been determined 20 years before. As to the quotation from 1 *Vent.* 15, That an action by the presentee of the grantee of the next avoidance, the grantee was repelled from giving evidence, it is so, but the book goes in the very next line, That an assignor might be sworn a witness to the assignment of a lease where there were no covenants.

Court unanimous, That there be a new trial upon payment of costs (1).

N. B. In the argument of the above cases, these authorities were cited, viz.

For the rule 2 *Lev.* 231, *The King v. The Mayor, &c. of London*—2 *Lev.* 236, and *Sir T. Jones*, 115—*Endfield v. Hills*, [3 *Keb.* 767, 809,] 2 *Roll. Abr.* 685, pl. 3. 2 *Sid.* 109. *Townsend v. Row*, *Lord Hale's Hist. Plac' Coron'* 1 vol. 661, 693. *ib.* 2 vol. 280—2 *Show.* 146, *City of London v. The Unfree Merchants*—2 *Keb.* 295, *Mayor of London v. Gould*—1 *Vent.* 351, *Case of the City of London concerning Water Bailage*—*Trials per Pais*, 162—1 *Sid.* 75, *Gie v. Rider*, 3 *Keb.* 90, *Champion v. Atkinson*—2 *Salk.* 690, *Rex v. Ford. Skinner*, 174.

Against it were cited, 1 *Salk.* 283, *Rex v. Whiting—Co. Lit.* 6—2 *Sid.* 2, *Oliver v. The Hundred of W [allington]*—1 *Vent.* 15, *Heath v. Pryn.*

MOORE

(1) This case is indeed mentioned, *arguendo*, 4 *East R.* 574, as having been the first wherein the soundness of the rule in *Rex v. Whiting*, cited in this case of *Bray*, was questioned; and then by *Lord Hardwicke*; but it does not appear to have met with the consideration or notice it deserves from other

writers. It will be obvious that the principle of the rational doctrine of the present day, in relation to the competency or incompetency of witnesses upon the ground of interest, is recognized in the above argument used by *Mr. Justice Lee*, viz. that in *Huggins's case*, *Fitzgib. R.* 8, in an action of

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MOORE *versus* The MAYOR of HASTINGS.[*Ante*, p. 353.]

A "reasonable" fine may mean a certain one.

SERJEANT *Parker* now moves in arrest of judgment: his exception is, That there is not a sufficient title shewn in the suggestion of the writ to entitle him to this franchise; for it does not shew how, or by whom, the fine is to be assessed; nor any way to ascertain it. The writ suggests a custom, That the eldest son of every freeman, being born within the port, hath a right in respect thereof, upon payment of a reasonable fine, to be admitted a freeman: and then the writ goes on, That the said *M.* ought by you to be admitted and sworn into the office of one of the freemen of the said port; but you refuse, &c. though the said *M.* has tendered to you a reasonable fine. In uncertain fines for copyholds, there is some measure for the fine to be settled by, viz. The value of the lands; and yet when it is laid in pleading, that a reasonable fine is due; it is likewise laid, that it is to be assessed by the lord, or his steward. So in *Co. Ent.* 646, *b.* and if necessary there is much more in this case.

If, upon the awarding a peremptory *mandamus*, the person should tender only 6*d.* as a reasonable fine, how can the corporation shew this to excuse themselves from an attachment upon that *mandamus*?

Lacy with him: Though the writ *de rationabili parte* be general as in *F. N. B.* 9, *b.* and the *Register*, 3 *b.* yet the counts upon those writs are all particular, as in *Co. Ent.* 564, *b.* *Rastal's Entries*, 541, *b.* *Herne's Pleader*, 781. In the same manner this writ, which is a declaration, should have been, that 6*s.* 8*d.* was a reasonable fine.

Strange, Solicitor-General, *contra*. As to the peremptory *mandamus*, if they refuse to admit us upon that *mandamus*, they will certainly be at liberty to shew we did not tender a reasonable fine when we come for an attachment.

Lord *Hardwicke*, C. J. There is no reason in this case to arrest the judgment. The objection is founded upon the same reason as that made at the trial, and which was over ruled; and if the objection be a good objection, we must take the word "reasonable" to mean necessarily uncertain; whereas we have resolved, that a reasonable fine may mean a certain fine. But I think further, that if the defendants would have taken advantage of it, they should

of escape against the warden of the *Fleet*, the escaper was admitted a witness, because the verdict could not be afterwards made use of. For a luminous discussion of the whole question, see 4 *East R.* 572, *cum notis*. See also the authorities subjoined to the case of

The King v. Nunez, pa. 266, *ante*. See also 4 *Burr.* 2251. 5 *T. R.* 27. 2 *Tid.* 805, ed. 1812. And see the observations of Lord *Kenyon*, C. J. upon the authority of this case, 3 *T. R.* 32. Also 6 *T. R.* 63.

should have returned, that he did not tender a reasonable fine. But what justifies us in this *case is, that I think this is an immaterial part of the writ, and that there was no occasion for the party to say any thing of the fine at all; for, when he sets out his right, and prays a *mandamus* to be admitted, he must take care to do what, else, is necessary. There is a precedent in *Tremain's Entries*, which is general, only setting forth his right, and praying, generally, to be admitted of the livery of the Vintners company. And the defendants in their return set forth, that a fine was to be paid; and no objection was made to the writ (1).

Judgment for plaintiff (2).

(1) See 5 T. R. 74, and the cases there cited.

(2) This case is cited 2 *Kyd* on Corporations, 356, as an authority for the position, that where the writ suggested that every person being the son of a freeman, and born after his father had been sworn, had a right to be admitted a freeman on paying a reasonable fine; and that this was held sufficient, without shewing in what manner or by whom the fine was to be assessed.

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EASTER TERM,

10 Geo. II. 1736. B. R.

PHILIP Lord HARDWICKE, Lord Chief † Justice.

Sir FRANCIS PAGE, Knt.

Sir EDMUND PROBYN, Knt. } Justices.

WILLIAM LEE, Esq.

JOHN WILLES, Esq. Attorney-general.

JOHN STRANGE, Esq. Solicitor-general.

The KING *versus* GREEN.

The order for maintaining a bastard child, must specify in what county it was born.

AN order of the quarter sessions made upon the defendant as the putative father, to maintain a bastard child, among several exceptions taken to it, was quashed; principally, for this; because it did not appear in the order, that the child was born in the county: for the act gives jurisdiction only to the justices of the county where the child was born. But, the defendant was bound over to appear at the sessions upon his own recognizance (2).

† Lord Hardwicke being Lord Chancellor, as well as Chief Justice, came into the court of B. R. 29th April, took the oaths, and heard Mr. Solicitor Strange's motion. 2 *Stra.* 1071. That

the office of Lord Chancellor and Lord Chief Justice were always held tenable together by the same person, see *Dugd. Chron. Ser.* 43. 50. *Sid.* 338, 365. *Dy.* 159. *Cro. Car.* 600. *Fortesc. Rep.* 382(1).

(1) See the case above referred to in *Dyer*, where it is observed by the several writers, that *Knevit* was chancellor and chief justice together in the time of E. III.; 5 Co. a. So was Lord Hardwicke, for which the above memorandum is cited; and Lord Loughborough lately. And Noel was chief justice of Chester, as well as a judge of Westminster Hall. But where two offices are incompatible, acceptance of

the second vacates the first. 2 T. R. 81. 1 *Doug.* 398, n. (22). 2 T. R. 777.

(2) But as to defect of county, remedied by its appearing in the margin of the order, see 2 *Const.* 499, MSS. As to omission of in what parish, see further 2 Lord Raym. 1363, S. C. 1 *Sess. Ca.* 292, pl. 229. *R. acc. Sett. & Rem.* 36, pl. 59. 1 *Str.* 437. 1 *Barnard.* 326. 1 *Const.* 498. *H. T.* 5 G. II. MSS.

TATLOCK

1736.

TATLOCK *versus* SWAN.

UPON a motion to stay proceedings on a bail bond, bail above having been put in, and perfected; *Abney* shews for cause, that the plaintiff has lost his trial, and the defendant is become bankrupt. *Whereupon the defendant's counsel submitted, and offered to confess judgment; whereby the plaintiff would have been in as much forwardness as if he had tried his cause.

Per Cur', The rule is, 'That if a trial be lost, the bail bond shall stand as a security, but now as the defendant will put you in the same state as if you had had a trial, the proceedings must be stayed.

In an action upon the bail bond, where the defendant consents to put the plaintiff in as good a situation as if a trial had been had, the proceedings will be stayed.

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The rule was, that upon the defendant's giving judgment and payment of costs, the proceedings upon the bail bond should be stayed (1).

(1) Where a trial has been lost, the giving judgment does not seem to be a necessary condition upon which proceedings upon the bail bond will be stayed; but wherever a trial has not been lost, even without an affidavit of merits, *per cur'*. 1 *Tid.* 295, edit. 1812, the practice is to stay proceedings upon putting in and perfecting bail above,

and paying the costs incurred by the assignment of the bail bond; and also if necessary, or the state of the cause require it, upon receiving a declaration in the original action, pleading isuable, and taking short notice of trial, so that the cause may be tried the same term. 2 *Smith R.* 13.

The KING *versus* HOLMES.

Andr. Rep. 216. [S. C. but not S. P.]

AN information upon the statute for using a trade, not having been an apprentice to the same [5 *Eliz. c. 4. s. 31.*] was removed hither by *certiorari*, from the sessions of the peace in *London*; and the proceedings returned were to the effect following; *Memorandum*, That at a quarter sessions holden on such a day, before, &c. comes *J. K.* who sues as well, &c. and gives information upon oath, according to the statute, to the effect following. *J. K.* informs that *J. H.* carpenter, at such a day, at such a place, did unlawfully use the trade of a founder, not having been brought up therein seven years as an apprentice, whereby he has forfeited the sum of one moiety to the King, and the other to the said *J. K.*

The day when it was exhibited must appear upon an information upon stat. 5 *Eliz. c. 4. s. 31.* otherwise it is bad and proceedings will be stayed.

An information cannot be amended by what appears on the return to the *certiorari* by which such information may have been removed.

Marsh

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The King
versus
Holmes.

Marsh moved, That the proceedings upon this information may be stayed, because the *stat. 18 Eliz. c. 5.* requires that every information upon a penal statute shall be exhibited by the informer in proper person; and [that] upon every such information a special note shall be made of the day, month, and year of exhibiting thereof: and the practice is, to mention in the body of the information, that he comes in person; and likewise to mention in the information, or by indorsement thereon, what day it was exhibited: all which are wanting in this case.

Serjeant *Draper* con'. This is supplied by the return which mentions the day on which it was exhibited, for that is; *memorandum*, That at the sessions, such a day, *I. K.* came and exhibited, &c. As to the coming in person, the court will take it, that he did; as in case, where upon a writ of error, the attorney's name by whom the defendant appeared was not named; for his christian and surname must be named: and the court held, that as a defendant can only appear by attorney, or, in person, and no attorney being named, they would *presume he came in person; he cited the case *Hetherington v. Reynolds*, 1 *Salk.* 8; where a feme defendant in the *Marshalsea* court married after plea pleaded, and then removed the cause into *B. R.* by *Habeas Corpus*; and *per cur'*, The course is in such case, to move the matter upon the return of the *Habeas Corpus*, and the court will grant a *Procedendo*; for though a *Habeas Corpus* be a writ of right, yet where it is to abate a rightful suit, the court may refuse it. So in this case, the plaintiff will lose the benefit by being out of time, if he is to begin again.

Besides, this is a matter of irregularity only, for which they should have complained to the court below.

Page, J. not in court.

Probyn, J. It is common doctrine, that the return cannot mend the record; now here is the record before us, and it does not appear that the day is upon the information; probably it might have been taken advantage of at the sessions, but here the information was removed by the prosecutor before the defendant had pleaded; so that he has put it out of the defendant's power to take advantage of it below, and therefore he must be allowed it here, which is the first opportunity; and I think the proceeding is irregular, and therefore ought to be stayed; and this is not like the case in error; for there he can appear only in person or by attorney; and therefore if it does not say by attorney, it must necessarily be in person, but here the act directs, that he shall exhibit in person; so that if he does not appear, the act is not pursued.

Lee, J. I am of opinion that the rule be absolute for staying the proceedings; for I think we are proceeding upon this information as the courts below should have done. The act directs, That there shall be an entry of the day, &c. and that the information shall not be deemed a record till then; so that here is an act of the court below returned to us, called information, which not having a proper entry is not a record upon which any process can issue, for the
act

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act having directed the day to be entered, that must appear upon the information to warrant the court to issue process. And there is further objection, that it ought to be exhibited in person; which being also directed by the act, ought to appear upon the information; but the other is the most material objection. As to the case in *Salk.* that was to help the party; but here the information is void.

Rule absolute (1).

(1) It is an indication of the progress which a more just knowledge of political economy is making, that the absurd restraints imposed by this statute, absurd with relation to the present age, are just repealed, viz. by stat. 54 Geo. III. c. 96. The name of Mr. Serjeant *Onslow*, the mover of the ques-

tion in the Lower House, will, in this instance, be identified with rational legislation; although the looseness of the act by which the repeal of ss. 25—30 is effected, has not escaped animadversion. See the query subjoined to the act, in the current edition of the statutes.

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versus
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*SAYER versus CURTIS.

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ERROR on an action of assault in the Palace court, and verdict and judgment for plaintiff.

The exception was, That the plaint is dated before the cause of action laid in the declaration.

Benny, for the defendant in error. Plaints in inferior courts are looked upon as originals, and the want of them aided by the statute of 18 *Eliz.* for, though the statute names only original writs, yet it has been extended by equity, as *Hob.* 120, *Wilson's* case. Want of a bill of privilege against an attorney of C. B. aided, *Hob.* 264, *Woodhouse's* case. Want of a bill in the King's Bench aided, by *Cro. Eliz.* 120. *Cro. Car.* 327, writ variant from the declaration shall not be intended the writ on which founded, but that the writ is wanting, and so helped after verdict. *Style*, 244: and *Salk.* 266, variance between a plaint in the inferior court and the declaration helped by the verdict.

Probyn, J. If this be an improper plaint to support the action, it is no plaint in the action, and where there is no plaint it is aided, and that last case is in point.

Lee, J. All the proceedings in the court below are now supposed to be before us; for, when an inferior court has returned a record, there can be no diminution alledged (2), and where the plaint is bad, the court after a verdict will not suppose it to be the plaint.

Page, J. of the same opinion.

Judgment affirmed.

A variance between the plaint and the declaration, in an inferior court, is helped by verdict. No diminution can be alledged of record from an inferior court.

(2) 1 *Salk.* 266, acc. But the court *Id. ib. n. (a)*. The general rule does may, if they see occasion, award a not, it is said, extend to *Wales*. 1 *Sid. certiorari ad informandam conscientiam*. 147, 364, 40. *Vid. Godb.* 267.

1736.

SALTERN Executor *versus* WYNNE Executor.

2 Stra. 1072.

An executor not to pay costs on the affirmance of a judgment against him on a writ of error, unless the first judgment were given on a false plea.

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DEBT, upon bond, in the Common Pleas, and judgment for plaintiff, and, upon a writ of error in this court, that judgment affirmed; and an action being brought upon that judgment in this court, and upon motion, it being referred to the Master to tax the principal, interest, and costs, a doubt arose before the Master, whether this being the case of an executor, he should allow the costs of the affirmance of the judgment upon the writ of error; and thereupon application was made to the court for their direction.

*And the court was clear of opinion at first, upon the authority of *Gale v. Tile*, which is 3 Lev. 375, and *Carth.* 281, That the executor shall not pay costs upon the affirmance of the judgment. But Mr. Solicitor-General having mentioned a case which he said was ruled to the contrary, and the words of the statute for amendment of the law being very extensive, viz. All such costs as have been expended in any suit in law or equity upon such bond, &c. they took to another day to consider; and then the Solicitor-General produced his case, which was *Merrill v. Jocelyn*, *Trin.* 13 Ann. Debt upon bond in *C. B.* Defendant pleaded payment before the day; plaintiff replied *non solvit*, and found for plaintiff; and the judgment reversed, because the issue was immaterial. Then another action was brought upon the bond in *B. R.* and motion to stay proceedings on bringing in principal, interest, and costs; and it was argued for defendant, that the statute could only mean on payment of such costs as plaintiff had a right to, and a remedy for: but *per Cur'*, Plaintiff must have costs of the suit in *C. B.* Not that persons are entitled to costs in every false action; but here his plea was a fraud, and that being the occasion of reversing the judgment, defendant shall have no advantage therefrom, but ought to pay the costs.

But he then mentioned another case of *Sisney v. Levinson*, *Pasc.* 12 Geo. I. *Stra.* 669, where in debt upon bond against an administrator, and a bill in equity to discover assets, and a suit in the Ecclesiastical court to compel him to bring in an inventory after judgment for the plaintiff in action upon the bond, and that judgment reversed in error; in the new action upon the bond, the court was moved, that the costs allowed to be brought into court might be the costs in Chancery, in the Ecclesiastical court, and upon the judgment reversed; but *per Cur'*, We have nothing to do, to award costs in another court that can award them if they think fit; nor ought they to give costs where the judgment is reversed, because they are occasioned by the wrongful proceeding of the party.

Court

Court clear of opinion not to allow costs, because the executor is not liable by law to pay costs upon a judgment affirmed in error; and that the costs to be paid in these cases are only what the defendant is by law liable to pay: and the Master was directed not to tax any costs upon the judgment affirmed (1).

It was strongly urged for plaintiff in the above case, That the penalty being forfeited in law, the defendant ought not to be saved from it but upon equitable terms, &c. But the

Court were clear of opinion as above (2).

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cutor
versus
WYNN Ex-
cutor.

(1) 2 *Str.* 1072. S. C. but the judgment is there said to have been obtained against the testator upon a bond.

(2) Although the point be here laid down generally, yet it may be observed, that if judgment be given below against an executor *de bonis propriis*, and such judgment be affirmed in error, he shall

pay costs. 2 *Barnard.* 450. 2 *Str.* 977. S. C. Also cited 1 *H. Bl.* 567, n. (a). And it seems to follow, and is, indeed so decided, on argument in the Exchequer Chamber, that executors are liable to costs in error, where they would be liable to the costs in the original action. 1 *H. Bl.* 566.

*CASWALL *versus* MARTIN.

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2 *Str.* 1072. S. C.

MOVED to stay proceedings, because the copy of the *Latitat* which was served, was only to answer J. C. Esq. without saying in a plea of trespass, or shewing any cause of action.

Strange, solicitor-general, for plaintiff. There has been common bail filed for defendant by the plaintiff, and defendant's attorney has taken the declaration out of the office, and paid for it, which is a waiver of the defect in the process (3). Cites *Widdrington v. Charlton*, *Trin.* 11 *Ann.* (4) in appeal of murder; the defendant came in upon the exigent, and the objection was, That the court did not pursue the writ, for it was an appeal by a widow, and the writ of exigent had not the material words *de morte viri sui*: but it was held, the appearance had cured the defect of the process, 1 *Salk.* 59. See *Wilson v. Laws* (5). See the case of *Morgan v. Luckup*, in *Easter* term last, *ante*, 242, 243.

Per Cur': The taking out a declaration, and paying for it, cures error in the process; for *per Page*, J. The process was only to bring him in, and he cannot have declaration without coming into court (6).

(3) 1 *Str.* 155: 2 *Str.* 989: 3 *Atk.* 570: 2 *Barnard. B. R.* 348.

(4) 10 *Mod.* 86.

(5) Also a case of appeal, 1 *Ld. Raym.* 20. S. C. more at large *Skin.* 551.

(6) See *pa.* 242, 3, *ante*, n. 1.

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MENDYPACE *versus* HUMFREYS.2 *Str.* 1073. *S. C.*

A countermand of notice of trial given to the agent in town, must be four days before the assizes.

IN ejectment. Countermand of notice of trial was given in a country cause to the agent in town on *Monday* night, and trial, being on *Wednesday*; defendant moved for costs, for not going to trial.

Lee, J. The rule is, That two days notice is sufficient, unless the cause is to be tried at the assizes, and the notice is given to the agent in town, for then there must be four days; but for the causes at the assizes, two days notice to the agent in the country is sufficient.

Plaintiff must pay costs (1).

(1) By stat. 14 *Geo. II. c. 17, s. 5*, at least before the intended trial. the countermand of notice of trial at the assizes, or in a town cause where the defendant lives above forty miles from *London*, must be given six days in the country. This case is cited 1 *Tid.* 71, edit. 1812, *Imp. K. B.* 82, for the point, that countermand of notice of trial may be given in the country.

The KING *versus* FERGUSON.

In the absence of special circumstances, *certiorari* to remove an indictment from the Old Bailey [*370] sessions to K. B., refused.

BENNY moved for a *certiorari* to remove an indictment for perjury against defendant, from before the sessions at the Old Bailey.

Court would not grant it.

**Lee, J.* It was done, indeed, in such an indictment in the case of *The King v. Morgan*, 2 *Str.* 1049. But that was upon the extraordinary circumstances of the case, for that he had been there two sessions, and used his utmost endeavours, and could not get it to be tried, though he was ready and had paid costs twice. But if we do it for asking, we shall have all the indictments come up hither (2).

(2) See 1 *Str.* 549; also 4 *Hawk. P. C.* s. 27, ss. 26, 27, 28, 7th edit. and the authorities there cited; where it appears, that a *certiorari* will only be granted at the instance of the defendant on an affidavit of special circumstances; such as, that he cannot have a fair trial in the court below, by reason of interested parties, local prejudices, &c.; also if it clearly be made appear, that the prosecution is malicious.

1736.

The KING *versus* FLINT.

INDICTMENT for removing a person from the parish of *Frying to Chelmsford*.

Lacy moved in arrest of judgment, 1st, Because the indictment says, he conveyed the pauper, or caused him to be conveyed, which is too uncertain. 2dly, Because it does not shew the person was unable to maintain himself, and so it does not appear to be to the damage of any one.

Per Cur', The indictment is bad for both exceptions, for the 1st, Upon the authority of *The King v. Stocker*, 1 *Salk.* 342, and 5 *Mod.* 137.

And for the 2d, Because, unless it is a conveying of a poor person likely to be chargeable, and to the damage of the parish, it is no crime.

Judgment arrested (1).

(1) And see 4 *Hawk. P. C. c.* 25, s. 58, 7th edit.

In an indictment charging the offence in the disjunctive, is bad.

In an indictment for removing a pauper, it must be alledged, that he was likely to be chargeable, and to the damage of the parish.

The KING *versus* SUTTON.

2 *Stra.* 1074. [S. C. but not so full.]

THE defendant was indicted, for that being a person of evil fame and reputation, on the 25th day of, &c. without any lawful authority, [he] had in his custody and possession two iron stamps, each of which would make or impress the figure, resemblance and similitude of one of the scepters made and imprest upon the current gold coin of this kingdom, called half-guineas, with an intent to make the impression of scepters on divers pieces of silver coin of this realm, called sixpences, and to colour such pieces of the colour of gold, and fraudulently to utter them to his Majesty's subjects, for and as pieces of lawful and current gold coin of this realm, called half-guineas, against the peace of our Lord the King, his crown and dignity. And the indictment further sets forth, That the defendant the day and year aforesaid, in the said county of *Northampton*, unlawfully *had in his custody and possession one piece of silver, coloured over with certain metal producing the colour of gold, and feloniously made to resemble a piece of the current coin of this realm, commonly called a half-guinea, with intent to utter the said piece so coloured and feloniously made to resemble a half-guinea to some of his Majesty's subjects

The knowingly having iron stamps which would make the similitude of a figure imprest upon the current gold coin, is indictable as a misdemeanor.

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subjects for and as a piece of lawful and current gold coin of this realm, called a half-guinea, (he the said defendant then and there well knowing the said piece to be silver coin coloured and falsely made) to the evil example of all others, and against the peace of our Lord the King, his crown and dignity (1).

The defendant was tried upon this indictment at the last summer assizes, and found guilty, before my Lord *Hardwicke*, C. J.: and he having some doubt, what the offence was, the defendant was brought up last *Michaelmas* term by *Habeas Corpus*, and committed to *Newgate*, and the indictment removed into the King's Bench by *certiorari*, for the opinion of the court. And Lord *Hardwicke*, C. J. then said,

As to the first part of the indictment, I doubted whether it was not high treason within the stat. 8 & 9 *Will. III. c. 26, s. 6*; but it is not at all clear it would be so, because this is only to stamp part of one side of the coin, viz. putting scepters. Then it is a misdemeanor at common law, and it did not occur to me, that having in one's custody with an intent, without any act done, was a misdemeanor. As to the second part, I doubted whether any precedent could be found, to shew that the bare having counterfeit money in one's possession, with intention to utter it, without uttering it, was an offence.

To support this indictment, it was argued, that unlawfully having in possession, with intent, &c. amounts to a charge of procuring and obtaining, with intent, &c. and 3 *Inst. p. 18*, was cited, where it is said, 'That if money false or clipped be found in the custody of any that is suspicious, he may be imprisoned until he hath found his warrant; there were likewise cited the following precedents:

July, 1689. Lee, Cox, and Smith, indicted at the *Old Bailey*, for having in their custody divers picklock keys, with intent to break open the houses of several of the king's subjects, and to steal their goods, and they were found guilty and fined.

Indictment against one *Haynes* and others, for lurking in a field with instruments for breaking houses, and binding persons; with intent to steal the goods of the king's subjects, and they were found guilty and fined.

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*1698. Indictment at the *Old Bailey* against *Brandon*, for unlawfully making or causing to be made four stamps for making of shillings, and having the said instruments in their custody, with intent to make counterfeit shillings.

Indictment at the same time against *Rogers & ur'*, for unlawfully procuring, receiving, and getting into their possession a pair of sheers, and other instruments for diminishing and clipping the coin, with an intent to clip the coin, and they were convicted of high treason, but no judgment given against them.

A man was convicted at the same sessions for having in his custody two ounces of silver clipped.

1716. One

(1) For a modern precedent, see *Cro. Circ. Comp. p. 110*.

1716. One *Launder* indicted at *Reading* for unlawfully obtaining, acquiring, and getting into his hands and possession an iron stamp, with intent to stamp paper.

The King v. Cox, 1690. Defendant indicted at the *Old Bailey*, for unlawfully buying twenty-seven counterfeit shillings traitorously coined, knowing them to be false and counterfeit, with an intent to utter them in payment.

King and Stevens, The like indictment.

1697. Indictment at the *Old Bailey*, before *Ward*, Ch. Baron, for unlawfully procuring, receiving, and acquiring into his possession counterfeit shillings, with intent to defraud the people of *England*.

1701. Another indictment of the like kind.

For the defendant it was argued, That the common law takes no notice of a bare intention, as a crime, unless coupled with some overt act; and therefore though in the time of *Edw. III.* an intention to rob was a felony, yet even then, as appears by 3 *Inst. fo. 5*, there must have been some overt act to shew that intention. So in *Bacon's* case, 1 *Sid.* 290, and 1 *Lev.* 146, though an intention to kill the Master of the Rolls was adjudged a misdemeanor, yet there was an overt act, viz. a reward offered by the defendant for doing it: so in *Holmes's* case, *Chro. Cha.* 376, where burning his house with an intention to burn his neighbour's, was held a misdemeanor; yet there was an act joined to the evil intention, viz. the burning his own house. So in the case of *The King v. Cooper*, 5 *Mod.* 206, and *Skinner*, 637, where an intention to assist the king's enemies was held a misdemeanor; yet there was an overt act laid, viz. hiring a boat for that purpose. But this indictment is really nothing more, than for an intention to make an impression with such stamps as he had in his custody; and a man may be possessed of a thing without having done any thing to acquire the possession; and the bare having a thing is not unlawful, unless made use of, or unless such bare possession is made a crime by a positive law, as in the case of the statute of *Will. III.* [c. 26.]

Per Cur', viz. *Page*, *Probyn*, and *Lee*, JJ. Judgment must be given against the defendant.

Lee, J. It is certain that a bare intention is not punishable; and yet when joined with acts whose circumstances may be tried, it is so; so an action innocent in itself, may be made punishable by an intention joined to it; as loading wool with intention to transport it, as *Lord Hale* says, in his *Hist. Plac. Coron.* 1 *V. p.* 229. In this case the indictment is for unlawfully having in his custody, stamps capable of making impression of scepters, with intent to make such impression: now the statute of 8 & 9 *Will. III.* [c. 26] has considered the having, as an act; for, by the statute, it is high treason to have [knowingly any] instrument, &c. in his possession; and though the word knowingly is added, yet that is an act of the mind only; and the only act capable of trial in the offence against the statute is the having in possession. All that is necessary

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necessary in this case, is an act charged, and a criminal intention joined to that act (1).

The court gave judgment, That the defendant do stand in the pillory at *Charing-cross*; and in consideration of his poverty and long imprisonment hitherto, That he do pay a fine of 6s. 8d. and be imprisoned for six months.

(1) See 2 Bl. R. 807, 822. Also 1 Hawk. P. C. c. 17, s. 75, 7th edit. See also 15 Geo. II. c. 28, which statute is said, in the book above referred to, to have provided for the doubt expressed by Lord Hardwicke, pa. 371, *ante*; but it will be observable, that his lordship's doubt is reported to have related to the first part of the indictment, viz. as to whether the knowingly *having* the instrument specified, with an intent to use it, were proved by the counterfeit found in the prisoner's possession, and whether if proved it were high treason;

now the statute 15 Geo. II. c. 28, is silent as to the knowingly *having*, and therefore cannot, it is submitted, have provided for the doubt expressed by his lordship as to that fact. Whatever doubt, indeed, might have been entertained as to whether the knowingly *having* a stamp made to impress a similitude of a part of the current coin, be indictable for high treason or as a misdemeanour, it is now obviated by the above later statute. The case, as from *Strange*, is cited *arguendo*, 2 East R. 14, 15.

DOE *versus* ROACHE.

Where the plaintiff in error, in ejectment, moves to stay execution, it must be upon payment not only of costs, but also upon payment of the mesne profits; and this, although the action be brought on the recognizance for damages only.

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EJECTMENT and judgment therein given, and affirmed upon a writ of error; and, upon an action brought upon the recognizance entered into at the bringing the writ of error, pursuant to stat. 16 Car. II. c. 8; which directs, that no execution shall be stayed upon any judgment in dower or ejectment by bringing a writ, unless the plaintiff in error shall be bound to the plaintiff in action, with condition, That if the judgment be affirmed, or the writ of error discontinued by plaintiff's default, or the plaintiff nonsuited, to pay such costs, damages, and sums of money as shall be awarded upon such affirmation, discontinuance, or nonsuit. And for ascertaining such sums and damages, it is enacted, That the court from whence the execution is to issue, shall award a writ to inquire as well of the *mean profits as of the damages by any waste committed after the first judgment. And upon return thereof, judgment and execution shall be for such mean profits and damages, and also for costs of suit.

In an action brought upon such recognizance against the sureties, defendant pleaded, no damages occurred. Plaintiff replied, and shewed a breach in non-payment of £18 for costs upon the affirmance of the judgment. And, upon defendant's motion, it was referred to the master to see what is due; and plaintiff insists, that the master is to inquire into the mesne profits as well as the costs, but the defendant says, it is the costs only which is the doubt now moved to the court.

On defendant's part it was said, that in this case the defendant
having

having pleaded, That no damages, costs, or charges have occurred, and plaintiff having replied a judgment of affirmance and for costs thereupon amounting to £18, so that plaintiff having taken his judgment for costs upon the affirmance upon the statute of *Hen. VII.* he has waived the benefit of the statute of *Car. II.* and the court can now take notice of nothing due on this recognizance but the costs; and, whether plaintiff is entitled to a writ to inquire of the mesne profits, is another question. If he may do it he will: but now there is no judgment for damages at the time of bringing this action besides the sum of £18. So that they have brought this action too soon; they ought to execute their inquiry first.

Per Cur'. They must pay the neat profits as well as the costs; for these cases of staying proceeding stand upon equitable considerations (1).

Therefore the money must stay in the master's hands, until the writ of inquiry of mesne profits be executed, and then upon payment of what is due for costs and mesne profits, the proceedings to stay.

(1) Although this case does not appear to be cited as an authority for the principle, yet in several cases it seems to have been held, that the bail must justify in double the improved rent, or value of the mesne profits, and single amount of the costs, 4 *Burr.* 2502: 8 *East R.* 298: *Bar.* 103, 212.

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DOR
VERSUS
ROACHE.

TRINITY TERM,

10 & 11 Geo. II. 1737, B. R.

Sir WILLIAM LEE, Knt. Chief + Justice.

Sir FRANCIS PAGE, Knt.

Sir EDMUND PROBYN, Knt. } Justices.

Sir WILLIAM CHAPPLE, Knt. }

DUDLEY RYDER, Esq. Attorney-General.

JOHN STRANGE, Esq. Solicitor-General.

HARPER *versus* JIFFER.

Where in
trespass *vi et*
armis for taking
plaintiff's horse,
he recover da-
mages under
40s. he is entitled
to full costs.

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TRESPASS for taking *vi et armis* plaintiff's horse, and sending and conveying it from *R* to *G*; and, upon not guilty, a verdict for plaintiff, and 1s. 6d. damages.

And the Master upon taxing costs doubts, whether plaintiff is entitled to any more costs than damages.

**Per Cur'*: If it had been in the old way *cepit et asportavit*, plaintiff after a verdict would be entitled to costs, be the damages what they would; and this amounts to the same.

Therefore plaintiff must have his costs (1).

WILMOT

† 2 *Sira.* 1075. *Andr.* 1. *Bur.* Set. Cas. 105. He was a gentleman of most unblemished and irreproachable character, both in public and in private life; amiable and gentle in his disposition; affable and courteous in his deportment; chearful in his temper, though grave in his aspect; generous and polite in his manner of living; sincere and deservedly happy in his friendships and family connections; and to the highest degree upright and

impartial in the distribution of justice. He had been a judge of the court of King's Bench almost twenty-four years, and for near seventeen of them had presided in it. In this station, the integrity of his heart and the caution of his determinations were so eminent, that they probably never will, perhaps never can be exceeded. He was peculiarly master of the learning concerning the settlement of the poor. *Bur.* Set. Cas. 328.

(1) The doubt might have arisen as to the operation of the stat. 22 and 23 *Car.* II. but it seems that the principal case would not be with the statute. Still the stat. 43 *Eliz.* c. 6. might be applicable to cases not within the stat. 22 & 23 *Car.* II. c. 9. where in trespass

the action appeared to the judge extremely frivolous and vexatious; in such case he might certify on the postea under the 43d *Eliz.* c. 6. that the damages to be recovered do not exceed 40s. See the authorities collected. 1 *Hul.* 65.

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WILMOT *versus* BYE.

MOTION to set aside a judgment, because the warrant of attorney, by virtue whereof it was entered up, was executed by the defendant while under age; and to set aside the warrant of attorney itself, and a bond given at the same time. And the proof of the infancy was, the affidavit of a person who was by at his birth.

Lee, C. J. There is no way of being helped in this case, but upon motion or by *audita querela*, and the last is seldom used. And in the case of *Bush v. Gower*, ante, 233, it was said, That such a judgment as this might be set aside on motion; and a case cited of *Jackson v. Mosey*, Trin. 3 Geo. I. in C. B. where it was done.

And I remember a case in this court, where upon a writ of error to reverse a common recovery, infancy being assigned for error, the court had inspection of the infant, and were assisted by affidavits, as to the facts, but it appearing doubtful upon the affidavits, an issue was directed to try the infancy.

Court unanimous, for setting aside the judgment and warrant of attorney; for here is evidence of the time of his birth uncontroverted(1): but the bond we will not meddle with, for that may be tried in an action.

A judgment entered up under a warrant of attorney executed by an infant, set aside on motion; but as to a bond given at the same time with the warrant of attorney, the court left the party to his defence on a trial.

(1) Acc. 1 H. Bl. 75. 2 Bl. R. 1133. nett, T. 32 G. III. C. P. Imp. C. P. See also 2 Str. 1043. *Chambers v. Bur-* 612.

HOSKINS *versus* SLAYTON.

At the Sittings in *London* after Term.

Coram Mr. Justice *Lee*.

INDEBITATUS *assumpsit* for goods sold and delivered. The goods were sails made for the use of a ship; and the evidence was, That the defendant who is the master of the ship, ordered the sails, and that the plaintiff knew the owner of the ship, and before that had applied to him that he might make them.

* And it was objected on defendant's part, that he is not liable, and a distinction offered, That where the owners live upon the spot, they only are liable to pay for the goods delivered for the use of the ship, though ordered by the master; but that where the owners live abroad, there the master is liable as well as they.

The owners or the master are in general liable for necessaries for the use of a ship, if the master or

[*377] der them; but if it appear that the credit had been given exclusively to the owners, and that the master in giving the orders

Sed acted merely as their servant, he will not be liable-

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*Sed per Lee:* In general, if the master orders the goods, both are liable, the master who gives the orders, and upon whose credit the work is done, and the owners in respect of the work being done to their property, for if I, without having given orders suffer a work to be done for me, I must pay for it: but yet though both are liable in such a case, yet if it appears that the credit was given to the owners only, and that the master in giving orders acted merely as their servant, he will not be liable; and he directed the jury, That if upon the evidence they thought no credit was given to the master, but the owners alone, then they should find for defendant.

Verdict for defendant.

N. B. Mr. Justice *Lee* made Chief Justice in the room of Lord Chancellor *Hardwicke*, who resigned this last vacation; and he took his place 13th of *June*.

KINASTON *versus* The MAYOR, ALDERMEN, and  
 ASSISTANTS of SHREWSBURY in Error.

(Vide p. 147, 295.)

When the House of Lords directs the court of K. B. to award a *venire de novo*, and omits all mention of costs, that court must award such writ, without imposing costs upon the party through whose default it became necessary.

**M**ANDAMUS to the corporation of *Shrewsbury* to restore *Corbet Kinaston*, Esq. to the office of alderman. The corporation returned, that he had been amoved from his office, and set forth the cause thereof; which return being traversed and a special verdict found, the court held the return insufficient; but the jury having omitted to give any damages or costs in their verdict, a motion was afterwards made, that the court would issue a writ of enquiry as to the damages; which was by the court unanimously refused; however after this, *Corbet Kinaston* caused judgment to be entered up upon the verdict; and the now plaintiffs in error brought a writ of error upon that judgment in the House of Lords; whereupon, besides the arguments in support of the return, it was insisted upon by the counsel of the plaintiffs in error, That the verdict was imperfect in not having found damages and costs in pursuance of the *stat. 9 Ann. c. 20.* and that no judgment could be given thereupon, and that therefore, the judgment given and entered is erroneous; for that the plaintiff below might still bring an action upon the case for a false \*return, and recover damages contrary to the intention of the said statute.

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And, hereupon, the House of Lords in *March* last adjudged, That the judgment of the King's Bench should be reversed, and that a *venire facias de novo* should be awarded by the said court, and they to proceed according to law: and ordered the record to be remitted.

In

In pursuance of which judgment of the House of Lords, the court is now moved in behalf of *Corbet Kinaston, Esq.* That they would award a *venire facias de novo*, and a rule being made to shew cause, it was not opposed by the counsel for the town of *Shrewsbury*, only they hoped, That as this was occasioned by plaintiff's own neglect, it might be upon payment of costs.

But *per cur'*: We must pursue the order of the House of Lords; and as there is no mention of costs in that, we can put no such terms upon them. So they awarded the *venire facias* without costs.

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KINASTON  
versus  
The MAYOR,  
ALDERMEN, and  
ASSISTANTS  
of SHREWSBURY  
in Error.

EWER and Others, Assignees of WINTER, a Bankrupt,  
versus PRESTON.

At the Sittings in *London*, in the Common Pleas, before *Willes*,  
Chief Justice.

TROVER by assignees in a commission of bankrupt. In order to prove a debt owing by the bankrupt to the petitioning creditor, for the purpose of shewing that the commission regularly issued, the evidence was opened, to be goods sold and delivered to the bankrupt; and the proof of that offered and objected to, was entries of the bills of parcels by the bankrupt himself, in his own books, before his bankruptcy, as goods bought by him of that creditor.

*Willes, C. J.* I agree that a bankrupt cannot be a witness to prove the petitioning creditor's debt, or his own bankruptcy, or any thing else, till his creditors have released him, because he is an interested person; but here the question is, Whether what he has declared under his hand, before his becoming a bankrupt, may not be evidence; and if it should not be allowed it would overturn every thing, for then a note of hand given him before bankruptcy would not be evidence of a debt, or a mortgage made by him, &c. would [not] have been always allowed good evidence of a debt; and therefore this will be so too: but neither that nor this will be conclusive evidence, for it may be shewn to have been fraudulently given or made; and if it be said that entries, or other things, under the bankruptcy, \*are no proof, though before the bankruptcy, what time is to be allowed? For a thing may be produced of twenty years standing, and sure there can be no imputation upon that; therefore the best way is to fix the time to stop, to be at his act of bankruptcy; for, till then, he is not interested; however, if such an entry be very recent, it may go to its credit: in this case the books by no means appear to have been made up for this purpose, but appear to be regular entries made from time to time. I think the bankrupt is so far from being interested upon this occasion, that

The entries of bills of parcels by the bankrupt himself, if shewn to have been made before his bankruptcy in his own books, are evidence of the debt for goods bought by him of the petitioning creditor: Aliter if not shewn to have been made before the bankruptcy.

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it is just the contrary; for, as this is a debt to be paid under the commission, the bankrupt's surplusage, if there should be any, will be so much the less: therefore, I think the entry, in this case, being before his bankruptcy, is evidence, though not conclusive, for they may shew fraud, &c. on the other side.

But plaintiffs not being able to shew this entry to be prior to the bankruptcy, they were

Non-suit.

N. B. Mr. Serjeant *Chapple*, on the 20th of *June*, took his seat as Puisne Justice, in the room of Sir *William Lee*, made Chief Justice.

### The KING and The INHABITANTS of BEDEL.

2 *Stra.* 1076. *Andr.* 8. [S. C. but not so full.]

Although in a question of bastardy the wife cannot be examined as to the non-access of the husband, yet if an order of two justices adjudge upon her examination, and other proof upon oath, such order is good.

ORDER of bastardy removed from the quarter sessions; which order was made upon an appeal from the order of two justices, and sets out the order of the two justices, which was to this effect, That *E.* the wife of *R. S.* was delivered of a male child in the parish of *Bedel*, and it appearing to the two justices, upon the examination of the said *E.* the wife, and other proof upon oath, That the said *R. S.* her husband, had not cohabited with her, or had access to her for seven years, and it was not known whether he was alive or dead; therefore they adjudge that the said *Moore* shall maintain the child. And the order of sessions states the fact, That upon her being examined, she gave an account, That she was married to the said *R. S.* in a barn, by a person not in the habit of a clergyman, and that the husband had not cohabited with her, or had access to her for seven years, and that she knows not whether he be alive or dead, she not having seen or heard of him in that time; but it appearing to them, by a certificate from the commissary general's office, and by the evidence of *A. B.* who was informed that *R. S.* was mustered in one of the troops of horse-guards, though he cannot take upon him to say it is the same *R. S.* as was mentioned to be the husband; therefore \*they adjudge that the order of the two justices for charging *M.* with the maintenance to be discharged.

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Upon a rule to shew cause why the order of sessions should not be quashed, and the order of the two sessions confirmed;

*Strange*, Solicitor General, for the rule, excepts, That the order of sessions is bad, for that it is immaterial whether *R. S.* was living or not at the time of the birth of the child or making of the order, he not having access to her for seven years; for it is now settled, that though the husband be *infra quatuor maria*, yet a child born of the wife may be a bastard, if it can be clearly proved that the husband

band had no manner of access to her. So in the case of *Pendrell and Pendrell*, *Hil. 5 Geo. II.* before Lord *Raymond*, at *Nisi Prius*†, in an issue directed out of Chancery to try whether issue born during a marriage were legitimate; and it was shewn in evidence, that, during the time in question, the husband constantly lived in *Staffordshire* and the wife in *London*; and Lord *Raymond* was of opinion, That the children born during that time were bastards; and the court of Chancery, when it came back, was very well satisfied with the verdict. So in the case of *Lomar and Holmden*, *Mich. 1792*‡, upon a trial at bar in order to bastardize issue born during a marriage, the court allowed evidence to be given of an absolute impossibility in the husband to beget children, but they could only give evidence of an improbability, and so failed in that case. And therefore as it appears that the husband, in this case, had no access to her, the order of sessions to discharge the putative father must be quashed.

*Dennison*, with him, cites *Salk. 123*, to the same purpose, and the case of *St. Andrew's and St. Bride's*, *Hil. 3 Geo. I. Stra. 51. Ses. Cas. 177, pl. 113.*

*Marsh*, to support the order of sessions, That in the case of *The King and Reading*, *Mich. 8 Geo. II. §*, the court held that the wife could not be a witness to prove no access from her husband; though possibly she might be allowed to prove a criminal conversation; and therefore 'tis probable the quarter sessions discharged the order of the two justices, merely, because it was grounded on her evidence.

*Dennison*: It could not be on her evidence only, because the order says, And other proof upon oath: But the court will take that to be the reason of their determination which is given in the order; and that is a bad reason, for 'tis because it appeared by evidence, (which indeed was no evidence of what it is said to be), That *R. S.* was alive, therefore, &c. And if the sessions have shewn the reason they proceed on to be bad, the court must take it they proceeded on that, \*and consequently will quash a bad order, grounded on that order.

*Lee*, Ch. Justice, absent.

*Page, J.* The order of sessions must be quashed, and the order of the two justices confirmed. As to the order of the two justices, no exception is, or, can be taken to it; for though 'tis said to be on the examination of the wife, 'tis also upon other good proof upon oath; and if justices of peace should examine some witnesses that are improper, and others that are proper, we will intend that they founded their judgment upon the evidence of those who were proper witnesses. As to the order of sessions, that court to be sure

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† 2 *Stra.* 925. 3 *Pcer. Wms.* 276. § *Ante*, 79. 2 *Ses. Cas.* 286, pl. 8. C.

‡ 2 *Stra.* 940.

175(1).

(1) Mentioned by Lord *Ellenborough*, C. J. in *The King v. Luffe*, 8 *East* 193.

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in discharging an order of two justices, need not set out for what reason they do it; but if they shew their reason, then it must be a good reason; now in this case they have shewn they founded themselves upon a reason, which is not good, and therefore we must quash the order thereon, and then the order of the justices stands in force. Besides the evidence of the marriage is not much to be credited, nor of the husband's being still alive; and if the woman was never married, or if she is a widow, her evidence is good.

*Probyn, J.* The sessions ought not to have received the evidence of the certificate, &c. at least 'tis not an essential evidence; and as they proceed upon that in making the order, it must be quashed.

*Chapple, J.* As to the order of sessions, the examination, taken there seems to be as to the husband's being alive, and no proof entered into to contradict the husband's access to the wife; and that evidence is by no means proof of it, and therefore the order must be quashed.

*Per Cur'*: Rule absolute, That the order of sessions be quashed, and the justices order confirmed (1).

(1) See p. 79, *ante*; and 8 East R. 193, pl. 1, where it was ruled, that an order of bastardy, stated to be made upon the oath of the wife as otherwise is good; for it will be presumed that the non access of the husband was proved by competent witnesses on oath other than the wife; or if proved by her also that the judgment of the jus-

tices was founded on the other proof. See also 1 Const. P. L. 457. 5th edit. where the same case is cited for the inference, that if non-access of the husband be legally proved, the justices may make an order of bastardy, without inquiring whether the husband be alive or dead.

## DAWSON and WILKINSON.

*Andr. Rep.* 11. S. C.

Prohibition granted, after sentence to compel present churchwardens to make a rate to reimburse the late churchwardens.  
No affidavit necessary.

[ \*382 ]

**M**OTION for a prohibition after sentence in a suit in the court of the Archdeacon of \_\_\_\_\_; in which sentence was given (upon a citation for the parishioners to allow the Churchwardens accounts) that the succeeding Churchwardens should make a rate to reimburse the former, for money by him expended for the parish, and not paid; because the Ecclesiastical Court has no power to decree such a rate, 2 *Roll. Rep.* 73. *Bishop's case*, and *Wainwright and Bagshaw, Pasc. 7 Geo. II.* (2), where said, *per Lord Hardwicke, C.J.* That the \*ordinary's jurisdiction, in these cases, extends only to compel the churchwardens to account before the parishioners, and no further.

On

(2) 2 *Stra.* 974. 2 *Barnard.* B. R. 421.

On the other side it was said, That the ecclesiastical court has jurisdiction, as to the churchwardens accounts; it has power to do every thing incident to it. *Yelo. 172, Starkey v. Barton and Gore.* And it was likewise objected to this motion, That as this is for a prohibition after sentence, the suggestion ought to be verified by affidavit.

*Filmer*, for the prohibition.

*Makepiece, contra.*

*Page, J.* The ecclesiastical court has no power, but to decree an account, and then the account must be audited; but they have no power to order a rate to be made to reimburse; so in *Tawney's* case, The churchwarden had disbursed money out of his pocket, upon a sudden emergency of a great sickness in the town, and yet the court would not help him.

*Probyn, J.* As to the want of an affidavit in this case, it is not necessary, because the want of a jurisdiction appears upon the face of the proceedings below: the churchwardens are always supposed to have raised money enough to pay themselves, and therefore can in no case be ordered a reimbursement.

*Chapple, J.* It is very plain from *Tawney's* case(1), That there cannot be a rate made to reimburse the churchwardens, and the reason is, Because they are not obliged to lay any money out of their own pockets.

Rule absolute for a prohibition(2).

(1) 2 *Ld. Raym.* 1009. 2 *Salk.* 531. 5 *Mod.* 97, S. C.

(2) *Acc. 1 Doug.* 116. 6 T. R. 159. 1 *Const.* 102 & n. (a). In the present case a prohibition to the ecclesiastical court which had ordered a rate for the reimbursement of churchwardens was granted, and in 12 *East.* 356, it was held, that a rate to reimburse churchwardens such sums as they had expended or might thereafter expend on the parish church would be bad on the face of it, as in part retrospective; and therefore the court would not grant a *mandamus* to the chapelwardens of a township within the parish, to make such a rate for raising their accustomed proportion of the whole: and their refusal to make such a rate when

demanded, applying as well to the form as to the substance of the demand, the court would not grant the *mandamus* to raise the money in the common form of such a rate prospectively, out of which the churchwardens might repay themselves. But the spiritual court may compel the churchwardens to deliver in their account, although it cannot decide on the propriety of the charges. 3 T. R. 3. See 8 *Mod.* 339. 2 *Burr.* 1152. By stat. 41 G. III. c. 23, s. 9, overseers may make rates to reimburse preceding overseers money advanced during a time when no rate was made, or pending an appeal affecting the whole rate, or under which it might be quashed.

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The intended husband of a woman, an infant, and whom he afterwards married, may release her orphanage share of her father's personal estate; such release is an extinguishment of the wife's right to the orphanage part, and leaves the estate of the father as if it had never been charged in respect of orphanage: consequently such orphanage cannot be considered as the dead man's part, and go wholly to the father's executor, but must be considered as a part of his personal estate, and be distributable accordingly.

The facts of the case submitted to arbitrators are to be fully laid before them, and if there has been any industry or art used by either of the parties to conceal, it is sufficient to make void the award.

**B**ILL brought for an account of the personal estate of *William Russell*, (by the plaintiff, who married one of his daughters) and to set aside an award concerning the distribution of it, and to have a release given in pursuance of the award delivered up. There was a cross-bill likewise, praying that the award might be set aside.

The case was this. In the year 1703, articles indented were entered into between *W. Russell*, citizen of *London*, upon the intended marriage of his daughter, and *Richard Johnson*, her intended husband; wherein the said *R. Johnson* and *Sarah Russell*, his intended wife, severally covenant with the said *W. Russell*, that the several sums of £1500 and £500, to be paid by the father, shall be taken as the marriage portion and advancement of the wife, and when paid shall be in full satisfaction, lieu and bar of all such part and share of the real and personal estate of the said *W. Russell*, as she, the said *Sarah*, or she and her intended husband, or he in her right, shall or may claim or be entitled to by common law, or by virtue of any custom of *London*. And the said *R. Johnson* and *Sarah Russell* do severally covenant with the said *W. Russell* not to commence or prosecute any action or suit in law or equity, for any part or share of the personal estate of the said *W. R.* which he, she, or they may claim or pretend to have by virtue of any custom of *London*; and that they will after the decease of the said *W. R.* execute a release of all shares which they may claim or pretend to have of the personal estate of the said *W. Russell*.

*Sarah*, the wife, was an infant at the time of executing the articles.

The marriage took effect, and the £2000 was paid.

*William Russell*, the father, afterwards died worth upwards of £2000 personal estate in the life-time of his son-in-law and daughter; and afterwards disputes arising between the plaintiff, who married another daughter of the said *W. R.* and the defendant *Johnson*, concerning the distribution of the personal estate, those disputes were submitted to arbitration, and an award was made that *Johnson* should be allowed his wife's customary share.

The plaintiff therefore brought this bill against the executor and against *Johnson*, to set aside the award, and to have an account of the personal estate; and proved in the cause that the articles abovementioned were shewn to one of the arbitrators only, but not to plaintiff's arbitrator, but kept from him by *Ives*, the executor, in whose custody they were, and who had bought *Johnson's* customary part.

*Ives*,

*Ives*, who was residuary legatee as well as executor, and had married likewise a daughter of *W. Russell*, brought another bill in order to set aside the award likewise, and for some other purposes; but his counsel finding it more for their client's advantage that the award should stand, insisted that it might not be set aside.

\*The Master of the Rolls made a decree in this cause, That both bills should be dismissed; and the matter is now brought to a re-hearing before the Lord Chancellor.

*Ryder*, Attorney-General, for the plaintiff. The question is, Whether a man before his marriage with a daughter of a freeman of *London*, that daughter being under age, may covenant to give up all claim to the daughter's orphanage part of the father's estate after his death.

In the present case here was, immediately upon the marriage, something of a vested interest, and it is not unlike a woman's title to dower.

A person may covenant not to claim even that in which he hath no right, but only a possibility: so in the case of *Hobson and Trevor*, 9 Nov. 1722 †, the defendant married the plaintiff's daughter, and precedent to the marriage, he not having much in present to settle, but having great expectation upon the death of *Sir John Trevor*, his father, the then Master of the Rolls, entered into a bond with penalty of £5000, conditioned that he would settle a third part of all the lands, which should come to him upon his father's death, upon himself for life, remainder to his wife for life, remainder to the issue of the marriage, remainder to his own right heirs: on the death of *Sir John Trevor* a considerable estate descended to defendant, and he refusing to settle according to condition, a bill was brought to compel him to a specific performance. The defendant insisted, 1st, That he having no right or title to the estate at the time of entering into the bond, it could not be bound by his covenant. 2dly, That he might, if he pleased, give up the penalty, and could not be compelled to a performance beyond it: but Lord Chancellor held, that though he had no right to lands at the time, yet he might bind himself in a covenant concerning them, to be performed when they should descend to him, for that a covenant might as well be concerning a thing to happen in future, as about a thing present. And, 3dly, That the defendant was not at liberty to give up the penalty; and decreed that the covenant should be specifically performed.

*Borley* and *Sir John Newland*, in *Can'*. The plaintiff and defendant had expectations from one *Mr. Turges*, who was no relation to either of them, and being afraid they could not keep up their interest with him if they did not agree among themselves, they entered into a contract, That whatever *Turges* should leave to

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† 2 P. Wil. Rep. 191, pl. 49. 10 Mod. 507. Stra. 533. [2 Eq. Ca. Abr. 21, pl. 18. Cited also 2 Ves. 412. S. C.]

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either of them should be divided between both; *Turges* left much the greatest share of his estate to the defendant; but the court decreed a specific performance of the agreement.

\**Taylor and Taylor in Scio'*, The like contract between two brothers, to divide equally what should come to them from their father, and the court decreed a specific performance of the agreement.

There have been cases also of this kind upon the custom of *London*.

*Lockyer & al' v. Savage in Scio'*†. Treaty between *B. and Savage*, for the marriage of *Savage's* daughter, and articles were entered into previous to the marriage, reciting the intended marriage, and in order that some provision might be made for the wife in case the husband should break. It was agreed, that the sum of £3000, part of her portion, should be placed out in *East India* stock, and vested in trustees, to be paid to the husband; but in case he should fail or die, then immediately to the wife for her sole and separate use, and afterwards to the issue of the marriage; and this portion of the wife was agreed to be a bar to any claims, that she might have for any part of the personal estate of her father by the custom of *London*. The husband afterwards became a bankrupt, and the plaintiffs assignees under the commission after the father's death, brought their bill for the wife's customary share. Two questions were made; 1st, Whether the agreement for the wife to have the stock, in trust upon her husband's failing was a good agreement. And the court held it to be good. 2dly, Whether the articles were a bar to the wife's orphanage part; and they held, that as it was in their power to make such an agreement, it was binding to them.

*Kemp and Kelsay, Chan. Preced.* 544 and 594. Plaintiff having married a freeman's daughter, covenanted to accept £100, then paid in full for his wife's customary share after the death of her father; and a release was given; but the father dying worth £10,000, a bill was brought for this customary share; and though it was said, that this was only a release of a possibility, and that it was done during the coverture, and the wife's right attempted to be bound by it; yet Lord *Macclesfield* decreed, That the right being vested in the husband, whether payable in the present or *in futuro*, it should bind the husband.

That in the present case the husband's right only is concerned, for there is no doubt but if the wife were to die, her share would survive to the husband. 1 *Vernon*, 89.

As to the award, the articles being kept away from one of the arbitrators by the executor, is an evidence of its being obtained by fraud, and therefore must be set aside.

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\*On the other side it was argued by *Fazakerly* and *Broxn*, That this not being the husband's estate, but the wife's, that none but

† 2 *Str.* 947. 2 *Eq. Cas. Ab.* 260, pl. 4, 272, pl. 36.

but her agreement could have made a specific lien upon it; and it is of another consideration, whether compensation ought not to be had against husband in damages upon his agreement: but that the wife could not agree, she having no ability to contract by reason of her infancy, and not having done any thing since to confirm the agreement.

That in no case any thing can be a specific lien, but where it is so *ab origine*; but in this case it was utterly uncertain whether he would ever be entitled to the distributive share of the wife; and if the husband had died in the life-time of his wife's father, there could have been no colour to say, that this agreement would have bound the wife.

That if this covenant be not strictly a specific lien, here are no equitable circumstances to give the plaintiff relief in this case.

That there is no doubt but a woman of full age may agree to accept another thing in satisfaction of dower, &c. but in this case she was under age.

Attorney-General, in reply, cited a case of *Visart v. Langdale*, before Lord King; a person before his marriage contracted that he would settle upon his wife an annuity for her maintenance and support after his death; it came to be considered, whether this should be a bar of her dower; and the court said, That notwithstanding she had a right to her dower by law, yet in equity this should have the same consideration as if an annuity had actually been settled upon her for life for her jointure; and though it was not mentioned to be for her maintenance and support, it was held to be the same thing.

*Hardwicke*, Lord Chancellor. The matter will fall under two questions, 1st, Whether by the articles entered into upon the marriage of *Johnson* and his wife, they are, either in law or equity, barred from claiming any share, or orphanage part of the testator's estate.

2dly, Whether the plaintiff can claim any benefit of that agreement, and

A third question may arise, Whether, supposing the orphanage part barred or satisfied, the award made in this case will make any alteration, and conclude the plaintiff from taking advantage of it.

\*As to the first, I am of opinion, That the defendant *Johnson* is barred by these articles.

This is an agreement entered into by the husband in consideration of the marriage, and of the portion paid by the father for her preferment in the world long before he was obliged to advance her one shilling; and there is no pretence of any advantage taken by the father of a pre-engagement of the affections of the young couple, or of any hardships put upon his daughter, which possibly might make an alteration in the case; but it stands singly upon an agreement made by the husband while the wife was under age, to quit

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quit all claim to her orphanage part of her father's estate in consideration of her portion.

And I think this must have the effect of a bar, whether it is taken to be so by the custom or not; for there are many cases where a wife may bar herself in a court of equity of her share in her husband's estate, or a daughter at full age of her father's estate, though it would not be so by the custom of *London*; and I think there is no difference as to this between rights at the common law, and by the custom of *London* or any other place.

There is no question but that a wife may bar herself of rights at common law in this court by somewhat which would not be a bar to her at law, as is commonly done in the case of dower, and I think it is the same as to customary rights. And as to the objection, that at the time of this agreement there was a contingency, only, and nothing vested, the same might be said as to dower, and other cases of the like kind. And there is no more doubt in a court of equity, that a man may bar himself of a contingent right or of a possibility, than that he may of a thing certain.

It has been said indeed, That the wife was under age, and that therefore in the nature of the thing it is no bar or composition with regard to the wife herself; and therefore it is rightly admitted, That had the husband died before the father, it had been a great question, Whether she would have been barred; though even then it might have barred, if the husband had by the articles agreed to have given her a settlement in consideration of this portion, and of its being a bar to her, for I do not know how in a court of equity she could have claimed her orphanage part, and the jointure settled in lieu of it likewise; but upon the nature of the thing without any such collateral circumstances there is nothing that will bar her.

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on the marriage bar himself of a contingent right to which he would be entitled on the death of his wife.

\*But certainly these covenants may bind the husband; he is living at the death of the father, and if he is bound, cannot a court of equity compel them to be carried into execution? Certainly it may; and the husband may now release this right so as to bar both himself and his wife; for it is a personal interest accrued to the wife during coverture, and may be as well released by him as a bond made to the wife; therefore, as the husband is bound, I do not see but that a court of equity must enforce it.

By the cases cited it has been determined, that a daughter may bar herself when of full age, and as the husband is here the only person before the court, the court must decree against him; and it would be very fatal to the city of *London*, and attended with very bad consequences, if this were not a bar; for fathers consider the state of their families, and what is proper to be done for them; it may happen to be very convenient to them to marry a daughter under age; but if it be said, that when they do so, they cannot possibly secure their personal estates from any future claims, it might prevent fathers from doing it, though that might be most for the benefit of those daughters, and of the rest of their families. And therefore

therefore I am of opinion, that this is good, and ought to have its effect in a court of equity.

The next question is, Whether the plaintiff, who is one of the daughters of *Russell*, can claim any benefit of this agreement, or whether it is only to be taken advantage of by *Russell's* executors. And that depends upon this, Whether this part, which would have been *Johnson's* orphanage share, will go to encrease the whole personal estate, and so encrease the orphanage share along with the rest; or whether it will go only to encrease the testamentary, or dead man's share.

It has been a constant rule, That where an agreement or composition is made with a wife or a daughter, to exclude them from the personal estate of the husband or father, which has been a bar within the custom of *London*, it is looked upon as encreasing not only the dead man's part, but the whole personal estate, and the whole is to be divided in such manner as if the party barred had been dead; as where the wife is compounded with, the personal estate is divided into moieties, and the dead man's part is considered as one moiety, and the children's as another.

The only question that could have arisen as to this is, Whether this being an agreement only to be carried into execution in a court of equity, and not a bar by the custom, should have the same effect, and I think it ought: for the agreement of the parties is, That the portion shall be accepted as a full satisfaction and bar of the customary part. For as agreements for doing either a legal, or a customary act are considered in this court just as if done, this must be attended with the same consequences as if the defendant had been actually barred; and then this will encrease not only the dead man's part, but the whole personal estate of the father: and the covenant to release to the representatives of the father, shews that it ought to be so; for they are trustees for all persons claiming any benefit out of the personal estate of the deceased: and therefore the plaintiff hath a right to call upon the executors to demand such a release to be made.

The third question is, Whether, supposing it is a bar, the award made in this case will make any difference, and preclude the plaintiff from the advantage of such bar. Now I think he is entitled to be relieved against this award; because the articles of agreement were a material part of evidence as to the justice of the case to be laid before the arbitrators: and it is plain they were never laid before both of them, as they ought to have been.

For though it is true, that arbitrators are judges of the parties own making, and therefore there is no colour to set aside an award, because they have mistaken the law (1), or judged wrong upon a doubtful

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(1) See 3 *Atk.* 463, (498). 6 *Ves. jun.* 282. 1 *Taunt.* 43. 13 *East R.* 337. *Ainsley v. Goff*, H. T. 1799. *Kyd on Awards*, 351. 1 *Moul. & Sels.* 105. But where it actually appears that the arbitrator means to decide according to law, but mistakes it, the award will be set aside. *Kent v. Elstob*, 3 *East R.* 14. See, upon the general point, 1 *Dict. Pr.* 60, title ARBITRATION.

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doubtful point, yet the fact is to be laid fully before them; and, if there has been any industry or art used by either of the parties to conceal, it is sufficient to make void the award. Besides, here are bills of each side which pray to set the award aside; it is true one of them may be dismissed if the party pleases, but as both are brought to a hearing, how can I say that what appears just to be done, and what both parties have prayed shall not be done? Then

Lord Chancellor pronounced his decree, That by the articles made in 1703, *Johnson* and his wife are to be considered in equity, as barred of her customary share of her father's personal estate; and that the arbitrators nominated on the part of the plaintiff, not having been informed of the contents or effects of these articles, and both the bills praying to set aside the award, That it be set aside. That the estate of *William Russell* be divided into two equal parts, one whereof shall be considered as the orphanage part, and the other as the dead man's part according to the custom of *London*; and such orphanage part to be divided into moieties, one moiety to be retained by the defendant *Ives* and his wife, and the other by plaintiff and his wife; and that the defendant *Johnson*, in pursuance of his agreement, do execute a release of his wife's customary share.

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\*The next day the Lord Chancellor brought into court a copy of a bye-law of the city of *London*, called *Judd's law*, made for the explanation of this custom in the 5th of *Edw. VI.* where, among other things, it is enacted, That if any freeman's child, man or woman, fortune to be married, in the life-time of his or her father, with his consent, and be not fully advanced to his or her full part or portion of the goods of his or her father as he shall be worth at the time of his decease, That then every such freeman's child so married, shall be to all intents and purposes excluded and debarred from taking his or her customary share of the father's personal estate, to be had at the time of his decease; except his or her father, by his last will and testament, or by some other writing by him written or signed with his name or mark, shall express and declare the certainty and value of such advancement; and then every such orphan, after the decease of the father, can bring forth such testament or writing wherein the sum advanced in certain may appear, shall be permitted to bring into hotch-pot such his or her portion, or the value of it; and shall have as much as shall make up the same, a full child's part or portion of the customary estate his or her father had at the time of his decease, notwithstanding he shall, by any writing under his hand and seal, declare such child to have been fully advanced.

Provided, That if any freeman's son being of full age, who shall be afterwards married with consent of his father, or any person is of full age, who shall afterwards marry any freeman's daughter, and confess himself by writing to be fully satisfied of the customary part or portion, due or to be due upon the death of the

the father by the law and custom of the city, then every such person so confessing or discharging, shall be reputed to be fully advanced, and be disabled to claim any part or portion of his or his wife's father's estate.

Which bye-law his lordship thought was very like, if not in point to the present case(1).

(1) This case is cited 1 *P. Wms. Sanders*. See also *Kyd* on Awards, 640. 1 *Atk.* 63, and the notes by Mr. 354.

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## ANONYMOUS.

**TRESPASS**; defendant justifies, as bailiff to Lord *Bathurst*; plaintiff replies, That Lord *Bathurst* was not seised; and the cause being to be tried at the next assizes at *York*.

*Fenwicke* moves to have the trial put off, till the Duchess of *Buckingham* be compelled by Chancery to produce a deed at the trial, which she refuses.

\*Court refused the motion, For perhaps the Duchess may have an interest in it, and what is that to the plaintiff, for he has not the deed, nor is in collusion with the Duchess, in which case possibly you might have framed a proper motion; but the court of equity is the proper place to apply to, and if they think proper, will grant an injunction. However your affidavit is not sufficient, for you only swear you apprehend the deed to be material, but you should have sworn you cannot safely go to trial without it.

Where the plaintiff moves to put off the trial until the production of a deed, it must be sworn, that the party cannot safely go to trial without it.

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## Between the PARISHES of BUTNEY and BENHALL.

*Bar. Set. Cas.* 107, pl. 33. 2 *Sira.* 1077. *Andr. 3.* *Ses. Cas.* 402, pl. 320. *S. C.*

A POOR person, one *T. C.* and his wife and children, were by an order of two justices, confirmed at the quarter-sessions, removed from the parish of *Benhall* to that of *Butney*; and the order of sessions stated the case specially, viz. That the said *T. C.* took a lease of a wind-mill in the parish of *Benhall*, for three years at £30 *per ann.* and likewise hired a cottage in the same parish by parol for one year, and so from year to year as long as both parties should please, at £3 *per ann.* That he occupied the mill for three years under the lease, and paid the rent; but had given security to the

A wind-mill is a tenement within the 9 & 10 *Will.* III. therefore by renting one of the value of 10*l.* a year a settlement is gained.

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the landlord during that time for the payment of it. That at the end of the three years he occupied the mill under a parol agreement, to hold it as long as he should pay the rent; but then he gave no security. And that he also during that time, had another cottage in the same place, at the yearly rent of £3:2s:6d.

*Lloyd* moved to quash these orders; the pauper having gained a settlement in *Benhall*, by renting the wind-mill, which is according to the statute of 9 & 10 Will. III. renting a tenement of 10s. a year: and he cited *Salk.* 536, where it was adjudged, that renting a water-mill of 10s. a year gains a settlement. And the case of *The King v. Inhabitants of Guildford*, Hil. 8 Geo. I. (1), where it was holden, that renting a mill generally gains a settlement.

On the other side, in support of the orders, it was said, That a wind-mill is not a tenement within the act. And it was further said, That the reason why renting a tenement gains a settlement is, because the person is supposed to be of proper abilities and circumstances, if a landlord will trust him so far: but in this case it appears, the pauper was not of such credit, because he was forced to give security for the payment of the rent.

*Lee*, C. J. absent.

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\*The Court gave little regard to the last reason; and as to the other, they held, that a windmill was plainly within the same reason as a water-mill, and was a tenement within the meaning of the act. So,

Both orders were quashed (2).

(1) 2 Stra. 508.

(2) 1 Const P. L. 93. S. C.

### SELBY and YORK.

Although whenever the want of jurisdiction appear upon the face of the proceedings below, prohibition after sentence may issue without affidavit, yet where such want appears upon suggestion only, after sentence, an affidavit verifying it is necessary.

**M**OTION for a prohibition to the Ecclesiastical court in a suit for defamatory words, viz. for calling the party whore; upon a suggestion that the words were spoken in *London*; but although rule to shew cause was made before sentence given, yet it was not served until after sentence.

*Lee*, C. J. absent.

*Per Cur'*: If the rule is not served they may go on to sentence; and if served after sentence only, it is the same as if the motion was after sentence. In this case it is plain they had not jurisdiction; for though they have jurisdiction for these words in general, yet they have it not when spoken in *London*, because there the scandal is temporary, whores being punishable by the custom of *London*; and we are bound to take notice of these customs of *London*, because they are established by act of parliament. And  
whenever

whenever the want of jurisdiction appears upon the face of the proceedings below, we prohibit, after sentence, without affidavit. But in this case it appears from the suggestion only, that the words were spoken in *London*, and therefore being after sentence it should have been verified by affidavit; for want of which

The rule to shew cause why there should not be a prohibition must be discharged.

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Between the PARISHES of WIDWELLY and FAR-  
RINGDON.

*Bur. Set. Cas.* 109, pl. 34. *Ses. Cas.* 401, pl. 319. [*Cald.* iii. 133, 211.]  
*Andr.* 4. 8. C.

ORDER of two justices made to remove a poor person from *W.* to the parish of *F.*

This order was discharged by an order of the quarter-sessions, which states the fact to this effect: That the poor person was hired for a year, and lived two years as a covenant servant in the parish of *F.* after which he went and lived with his father and mother in a cottage, \*in the parish of *W.* which his father held by lease for lives; that after his father's death he lived in said cottage until the lease was determined, and then he took administration to his father; upon which case the session being of opinion, that he had gained a settlement by living in the cottage, discharged the order of the two justices.

A son's residence in a leasehold cottage after his father's death intestate, without the son's taking out administration until after the expiration of the lease, does not obtain a settlement.

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In support of the order of sessions, was cited a case of *The King* and the Parish of *Wiley*, in *Wilts*, *Mich.* 2 *Geo.* I. (1), where a cottager having built a house upon the waste, the lord agreed to grant him a lease, and a sum of money was deposited as the consideration of the lease, but nothing further was done, and no lease was granted. After the cottager's death, his daughter claimed it; and she and her husband lived there some time; and the court was of opinion, That though no lease was actually granted, yet the enjoyment of the place, and living there, had gained a settlement.

*N. B.* The enjoyment by the father and daughter was forty years.

But *Per Cur'*: The order of sessions is bad.

*Lee*, C. J. absent.

*Page*, J. Whatever expectations the pauper might have in this case, he had not this cottage in his own right; and therefore the order of removal was good. Suppose a man should devise a house to another [of the value of] £10 a year, to pay his debts, which amounted

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amounted to as much as the house was worth; would the devisee by living in this house gain a settlement? No, sure. Then this being only 30 or 40s. and not land of inheritance, the question is, Whether it can be within the equity and meaning of a tenement of £10 a year? Indeed, where a person has land of inheritance, we do not remove him from it: and as to the case cited, there had been so long a possession, that it was like an inheritance.

Probyn, J. The only question here is, Whether the pauper was removeable? Now when an estate comes to such an one, whether by an inheritance or as executor, or otherwise, he is not removeable from thence after having lived there forty days; but in this case the administration was not taken out until after the term ended; which could give him no interest; but he was there only as a tenant at will, and so might have been removed: and being removeable could gain no settlement.

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**Chapple, J.* There was no time that this poor person was irremovable; and I always took it that, to be irremovable, and to gain a settlement, are equivalent.

Order of sessions quashed (1).

(1) See the case as reported, together the pauper would have gained a settlement had he taken out administration. See also 2 *Const. P. L.* 461.

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Andr. 19. [S. C. but more full.]

Where in account the plaintiff obtains a verdict upon the plea of *plene computasset*, the judgment is *quod computet*.

IN an action of account, *Dennison* moved, That the *fieri facias* executed in this cause, and the money levied, might be restored; for this was an action of account to which the defendant pleaded, That he had fully accounted, and issue being joined thereupon the jury found for plaintiff, and assessed damages and costs, and judgment entered accordingly, and this execution awarded; whereas, upon that verdict, judgment ought to have been only *quod computet*, and then the parties should have entered into an account before auditors, and the final judgment not to have been signed until then.

For the plaintiff it was said, That supposing this judgment wrong, yet the execution should not be set aside upon motion, but a writ of error should be brought.

Lee, C. J. absent.

Per Cur'. The judgment is wrong; for it ought to be only *quod computet*; and we will take this to be an irregular judgment, and like a final judgment signed before any interlocutory judgment: and

and as the judgment appears to be irregular, we must set that aside as well as the execution; for I don't see how we can set aside the execution, while the judgment stands as a warrant for it.

The rule was, That the judgment and execution should be set aside, and the money levied to be restored, and the plaintiff to pay the costs of the motion (1).

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(1) This judgment, although on verdict, is to be considered as interlocutory, see the report of the same case, *Andr.* 19; also *Cro. Eliz.* 82; also a judgment *quod computet*, 1 *Bk. Judgments*, 6; also *Co. Ent.* 46 b. *Rast. Ent.* 17. And for a full view of the record and proceedings in account, see 3 *Wils.* 73, *et seq.* and the authorities there cited. Account, and not assumpsit, seems to be the proper action on a running account between a merchant and a broker, 2 *Campb.* 238; but as this proceeding is difficult, capable of great protraction, and also expensive, the bill in equity seems a preferable remedy. The case referred to, 3 *Wils.* 73, was pending in the court of C. P. fourteen years.

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10 & 11 Geo. II. 1737. B. R.

Sir WILLIAM LEE, Knt. Chief Justice.

Sir FRANCIS PAGE, Knt.

Sir EDMUND PROBYN, Knt.

Sir WILLIAM CHAPPLE, Knt.

} Justices.

DUDLEY RYDER, Esq. Attorney-general.

JOHN STRANGE, Esq. Solicitor-general.

MIDDLETON and CROFT.

Ante, 326, but not S. P. 2 *Stra.* 1056. *Andr.* 57. 2 *Barnard.* B. R. 351.
2 *Atk. Rep.* 650. 2 *Kel.* 148, pl. 124. 4 *Vin. Abr.* 520, pl. 14. S. P.

Prohibition by husband and wife not abated at common law by the death of the husband; and if it were, the action surviving, it was aided by stat. 8 & 9 *Will.* III. c. 11.

The plaintiff in prohibition, although succeeding only in part, is entitled to costs from the original motion for the prohibition.

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PLAINTIFFS, husband and wife, declared in prohibition about a suit brought against them in the Spiritual court for a clandestine marriage, without banns or licence, and at uncanonical hours; and upon demurrer to the declaration, judgment was given last *Michaelmas* term, that a consultation should go as to the marrying without banns or licence, and the prohibition to stand as to so much of the suit as was for marrying at uncanonical hours.

After which judgment, the husband being dead, application was made to the court that the wife might have her costs; but the husband's death not being suggested on the roll, the court would do nothing in it.

A suggestion of the husband's death was then made upon the roll, and the court again moved that the master might tax costs for the wife, and thereupon three questions arose.

*1st, Whether, by the death of the husband, this suit in prohibition be abated, or if it survives to the wife.

2dly, Supposing it not abated, then whether the plaintiff having only obtained a prohibition as to a small part, and a consultation being

being awarded for the rest, the plaintiff be entitled to any costs by virtue of the statute 8 & 9 Will. III. c. 11. s. 3.

3dly, If entitled to costs at all, whether it be to costs from the time of the first motion, or only from the declaring the prohibition.

As to the second point, the case of *Dr. Bentley* and the bishop of *Ely*(1), was cited for plaintiff; where, in a suit in prohibition in this court, judgment was given that the prohibition should stand as to all the articles, concerning which the doctor was libelled below; but upon a writ of error in the House of Lords that judgment was reversed, and a new judgment given, That the prohibition should stand as to part of the articles, and a consultation go as to the rest; and there it came to be debated, Whether the plaintiff in prohibition was entitled to costs, he having judgment only for part, and this was solemnly argued, and a day being appointed for that purpose, by all the judges then present, and thereupon the plaintiff had judgment for his costs.

As to the third point, the plaintiff's counsel cited the case of *Suetnam* and *Archer*, *Hil. 12 Geo. I.* (2), where the question was, Whether the plaintiff in prohibition was entitled to costs after judgment by default, and the statute saying no more than where the plaintiff obtains judgment or award of execution after plea pleaded or demurrer, and that case was not determined; but in that case was cited the case of *Sir H. Haughton* and *Starkey* (3), where in the Exchequer chamber, before all the judges, That costs in prohibition ought to be given from the time of the first motion.

They cited likewise the case of *Berry* and *Croft*, *B. R.* (4), where the same thing was resolved, for that words, "suits in prohibition," which are mentioned in the act, mean nothing more than an application to the court for a remedy, which is by the first motion.

Upon the authority of which cases the whole court, in *III.* term last, were of opinion clearly, That a plaintiff in prohibition having judgment for any part of the matter declared for, is entitled to his costs, and that from the time of the first motion: and Lord *Hardwicke* then observed, That this case is within the very words of the *statute, which are, If the plaintiff obtains judgment, or any award of execution after plea pleaded or demurrer joined; and the statute only provides for the defendant's recovering his costs in such suits where the plaintiff shall become non-suit, or suffer a discontinuance, or a verdict shall pass against him; neither of which is the case here; and as to the *quantum* of the costs, he said, that though it is an equitable construction of the statute, to give costs from the first motion, yet where a consultation is awarded as to part, it is in the discretion of the court, upon the circumstance

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(1) *Fitz.* 107, 305. 17 *Vin.* 155. 1
Barnard. 192, 388, 451. 2 *Id.* 9. 2 *Str.*
912. *Fort.* 298. 4 *Bro. P. C.* 41.
(2) *Mod.* 738, but not *S. P.*

(3) 1 *Str.* 82.
(4) Cited 1 *Str.* 82, under the name
of *Bary* and *Cross*.

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circumstance of the case, whether they will allow so much or not. But,

As to the first point in this case about the abatement, the court not being then fully resolved, took time to consider.

It was argued for plaintiff, as to this point, that this being a writ of error not to recover any thing, but only to be discharged of a burthen, that therefore it is not abated even at common law, like as in an *audita querela*, the death of one of the plaintiffs or defendants shall not abate the writ, for that reason. 11 Rep. 135 a, *Read and Readman's case*. So in a *quare impedit* brought by co-parceners, or by baron and feme, the death of one of the parties shall not abate the writ, 7 Co. 26 b. and in *Owen*, 13, *William Barker's case*, where a prohibition was brought by two persons for tithes, it was held, That the death of one of them should not abate the writ of prohibition, because nothing is to be by them recovered, but only they are to be discharged of tithes; and though that case was not against a husband and wife, yet that will not make any difference, because the suit below in this case is not *civiliter*, but *criminaliter*, in order to punish them; and a wife, in a criminal prosecution, may answer and be punished without her husband; and if a fine be set on her, it shall not be levied on the husband, 11 Rep. 61 b. in *Dr. Foster's case*; so that the death of the husband, in this case, will not at all lessen the punishment of the wife; nor is the suit below abated by death, *Cro. Jac.* 483, the bishop of *Carlisle's case*.

But however, if this were an abatement at common law, it is plainly not so now by the stat. 8 & 9 Will. III. c. 11, s. 7, which enacts, That if there are two or more plaintiffs, and one or more of them die, and the cause of action survives to the other plaintiff, the writ or action shall not be abated thereby: now the cause of action in this case is the prosecution against husband and wife, and the wife has as much cause to complain thereof as the husband, and consequently as much a right to stay the suit, and therefore the cause of action survives to her according to the words of the statute.

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*For the defendant it was said, That as to the case of *Owen*, that was a prohibition for persons who needed not to have joined, but might have had several prohibitions, as the practice is now; but this is by husband and wife.

That no case is cited where action brought by or against husband or wife, and the husband dies, that the writ does not abate; whereas in *Co. Lit.* 285 a, in action of waste by baron and feme in remainder in special tail, and the wife die without issue, the writ shall abate. And in *Style*, 138, *White and Ur* against *Harwood*, though it is not determined, yet it is said the court inclined, That in an action against husband and wife for slanderous words, the husband dying, that the writ should abate.

Then as to the statute, that intended to provide only for partners, where a real cause of action survives, whereas in suits by husband

band and wife, they are considered only as suits of the husband, and if judgment should be given against the wife only, the party would not be entitled to costs.

For the plaintiff it was answered, That as to *Co. Lit.* 285, where an action of waste is brought by baron and feme, in remainder in special tail, it is allowed, because waste is a damage to the inheritance, and the writ must be, *ad ex hereditationem*; and therefore, when the inheritance is gone by the death of the wife, without issue, the writ must fall of course; and as to the case in *Style*, there is a case in *Hardres*, 161 (1), which is contrary.

Clive and *Gundry* for plaintiff.

Strange, Solicitor-General, and Serjeant *Wynne*, for defendant.

And hereupon the court were, this term, clear of opinion, That this was not an abatement at common law, and if it had, it were now no more so by the stat. 8 & 9 *Will.* III.

Lee, C. J. I take the general rule of abatements to be, That if the plea depending continues after the death of either of the parties, in the same kind as before such death, that then the death will not make an abatement; and in the instances that have been mentioned, as of coparceners, and there though there be a summons and severance of one of them, and that coparcener dies, there shall be an abatement, notwithstanding the summons and severance; and yet if an executor be summoned and severed, and dies, it shall not be an abatement, as is resolved in *Reed* and *Redman's* case; but the reason *of the difference is, that where the coparcener dies the survivor is entitled to recover the whole, and therefore ought to vary her writ: and I take it to be the meaning of Lord *Coke*, when he says, If the plaintiff may have a new writ the abatement shall be, he means a writ that varies in its demand from the other; but how does this case stand? here is a declaration in prohibition by husband and wife; now supposing we should adjudge this writ to be abated, can the wife proceed in any other manner than she is now doing? No, surely; a new writ indeed she may have, but it must be exactly in the same way as this, which differs entirely from the case where plaintiff may have a new writ of a different form, notwithstanding there be a severance. The distinction too, where the writ is to demand something, and where only to sue for a discharge, is very material; and therefore, though in a writ of error, that being to have restitution, the death of one will abate it, yet in an *audita querela* such death will be no abatement, because that is considered only as a suit for a discharge: so that I do not think this would be an abatement at common law. But the case is strong upon the act of parliament, for that extends generally to all plaintiffs where the cause of action survives; and no doubt it does here, for she alone has a right to a prohibition to prevent the punishment or proceeding in the suit. The only difference that has

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(1) *Harris v. Philips and Biggs.*

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has been mentioned between this and other cases, is, that here the plaintiffs were husband and wife, but in *Hardres*, 161, *Harris v. Philips* and *Biggs*, in an escape against the sheriffs of London, after trial at *Nisi prius*, and before the day in bank, one of them died, and this was held to be no abatement. And the court compared it to a trespass, or ejectment, brought against baron and feme, who are but one person in law, and yet if the baron dies, the suit shall proceed against the wife (1), in which instance there is put this very case, and this is as strong a case to consider them as different persons, as any whatever.

Rule absolute for allowance of costs to plaintiff (2).

(1) *Cro Jac.* 356. *Rot. Rep.* 14. So if feme die, the baron shall have judgment against him.

(2) But see *Bettinson v. Henchman*, *Cook. Rep.* 20, where it appears that

plaintiff in prohibition shall only have costs from the time of making his rule for the writ absolute. See also *Palmer v. Williams*, clerk. *Bar.* 130.

CASBURNE and INGLIS *et al.* In Chancery.

1 *Abr.* 136, pl. 23. 2 *Eq. Cas. Abr.* 728, pl. 6. *Atk. Rep.* 603, pl. 275. S. C.

Post Termin. Hill. 11 Geo. II.

Where a woman, mortgagor, marries, and not having redeemed, dies, her husband is entitled to be tenant by cur- [*400] tesy of the mortgaged premises.

An equity of redemption is an estate in the land.

Foreclosure of an equity of redemption is considered as a new purchase of the land.

Although a mortgage in fee after a devise of the estate is in law a total revocation, yet in equity it is a revocation *pro tanto*.

A husband shall be tenant by the curtesy of the equitable estate of the wife, and the heir at law may oblige him, like any other tenant for life, to keep down interest.

TWENTY-FIFTH of March, at the day of causes by consent Lord Chancellor Hardwicke delivered his opinion in this cause.

Anne Casburne being seised in fee, did, before her marriage, borrow £900 of the defendant *Scarr*, and by the lease and release to *secure the payment thereof she mortgaged the land in question to the defendant *Scarr*, in fee, subject to redemption.

August, 1729, the said *A. Casburne* married the defendant *Inglis*, and died on the 9th of Nov. 1737, leaving issue by him a son, who died without issue, and upon his death the plaintiffs, *Elizabeth* and *Mary Casburne*, who were sisters to the said *Ann*, were his heirs at law.

In *Trinity* term, 1733, the two plaintiffs, the sisters, filed their bill against the mortgagee, and against the defendant *Inglis*, to have liberty to redeem, and to have an account of the rents of the real estate descended to the son, they being his heirs at law.

Defendant *Inglis*, by his answer, insisted, that he was tenant by the curtesy.

The cause was heard before the Master of the Rolls, who decreed, That the defendant *Inglis* was not entitled to be tenant by the

the curtesy, and that he should account for the rents and profits from the death of the son.

From which decree the defendant has now appealed.

And the question hereupon is, Whether a husband can be tenant by the curtesy of an equity of redemption upon a mortgage in fee?

This question depends upon two considerations:

1st, What kind of interest an equity of redemption is in the eye of this court?

2dly, What is necessary to entitle a husband to be a tenant by the curtesy of an equitable interest in lands?

As to the first consideration, an equity of redemption has been considered as an estate in the land; such an interest as to descend from ancestor to heir; such an interest as may be granted, devised, entailed, and the entail barred by a common recovery, &c. This proves that it is not a mere right, but that it is such an estate, as that, in the consideration of this court, there may be a seisin of it; for otherwise, a devise thereof could not be good. The person who has it is considered as the owner of the land, and the mortgagee to retain it only as a pledge; and therefore, even a mortgage in fee is considered as personal effects, notwithstanding the legal estate is in the heir of the mortgagee. Neither will the mortgagee of such a mortgagee be tenant by the curtesy, unless the mortgage is foreclosed; for then the land is no longer a pledge only to the mortgagee: and such a mortgage will not pass by a general devise of all lands and tenements, as was determined in the case of *Sir L. Strode* against *Lady Russell* and others, 2 *Vernon*, 625 (1): and if so, it shews that a release of the equity of redemption, or a foreclosure thereof, is considered in a court of equity as a new purchase of the real estate in the land, and that the mortgagor is considered as having the real estate until then. Upon the like reason in 2 *Vern.* 401, *Burnet v. Kinaston*, a mortgage in fee was held to be only a chose in action, and so to survive to the wife. And if the mortgagor's interest be in the eye of this court an interest of that kind only, it follows that the person who is entitled to the equity of redemption, must, in this court, be considered as having the real estate; for otherwise that would be quite sunk, which can by no means be admitted. This will be further proved by considering a mortgage in fee, which is made after a devise of the same land, which at law is a total revocation of the devise; but in a court of equity is only so *pro tanto*, and no more than letting in the incumbrance of a mortgagee upon the land devised; and

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(1) Upon the position here advanced, Mr. *Sanders*, 1 *Atk.* 605; n. (1), has written an elaborate note, the scope of which is to shew, that if it be to be understood that a general devise of all lands and tenements will not pass the legal estate of mortgagees in fee after forfeiture, the position is questionable; if that such a devise will not pass the beneficial interest, the position, generally speaking, is certainly right. Mr. *Sanders* cites, principally, 2 *P. Wms.* 108: 1 *Atk.* 606: 2 *Vern.* 401, and 2 *Vent.* 315.

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and the reason of that is, because the land still remains in the mortgagor.

It has been objected to this on the part of the plaintiff, That an equity of redemption is no more than a right of action, and not such an estate as that there might be a tenancy by the curtesy of it.

But it is no otherwise so than every other interest, which can only be come at by *subpana*, which is the case of all the trusts, and yet they are always considered in this court as real estates; and if the equity of redemption is no more than a right of action, it follows from thence likewise, that the estate of the land must be said to be in no one; for it has been determined, that the mortgage is no more than a chose in action.

It was likewise said, That the mortgagee is not barely a trustee for the mortgagor, and that there it differs from a trust; and it is true, he is not barely a trustee for him: but in this case it is sufficient if he be at all a trustee. And though he be entitled in his own right to the money due upon the mortgage, yet as to the inheritance descendable, and the real estate, he is a trustee only, until foreclosed.

2dly, What is requisite to entitle the husband to be tenant by the curtesy of lands, wherein the wife had no legal estate during the coverture.

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*At common law, four things are necessary to entitle him to a tenancy by the curtesy; marriage, seisin of the wife, issue, and death of the wife. *Co. Lit.* 30. a.

It is admitted, That in this case three of the requisites do concur, marriage, issue, and death of the wife. But it is said, here was no actual seisin of the wife during the coverture, and it must be allowed here was no actual seisin of the freehold at common law; nor indeed any actual seisin at all of the legal estate, either in fact or in law; but that is all beside the question; for it proceeds upon a supposition, that there can be no tenancy by the curtesy, but of a legal estate, which would be to overthrow many settled cases: the true question is, Whether here was such a seisin in the wife, as is, in the consideration of this court, equivalent to a seisin in law? And that, I think, there is.

I have already shewn, That an equity of redemption is the ownership of the land; and if so, there must be such a thing as a seisin; and what else could that be than what the defendant and his wife had in the present case? The mortgage in 1728; she married in 1729; and died 1731; and, as there was no foreclosure, she all along continued in possession of the land; and though that possession was, in consideration of common law, but as tenant at will to the mortgagee, yet in equity, she is considered to be owner of the estate, though subject, indeed, to the mortgage upon it. So that, here was an uninterrupted possession coupled with an equity of redemption, than which there cannot be a higher instance of a seisin of an equitable estate.

The

The only question then is, Whether there can be a tenancy by the curtesy of an equitable estate of the wife? And it has been often determined that there can. In the case of *Lady Williams* and *Sir Boucher Wray*, 2 Vern. 681, two cases were cited to that purpose; and one of them was of a trust subject to the payment of debts, which differs very little from the present case: and, if the trustees were in possession, those cases were stronger than this; but the case of *Sweetapple v. Bendon*, 2 Vern. 536, went a great way further; for in that case there was neither seisin, nor land, nor any thing real at all, but only the sum of money decreed to be laid out in land, which the court considered as land, and decreed the husband to have the interest or proceed thereof for his life as tenant by the curtesy.

The principal objections under this head were two.

* 1st, That there was a laches in the husband, because he might have paid off the mortgage or brought a bill to redeem, and so have gained an actual seisin to his wife.

2dly, That it is determined, That a wife cannot be endowed of an equity of redemption, and therefore that the husband ought not to be tenant by the curtesy.

As to the first objection, the laches was compared to a laches in not gaining a seisin in law by entry, &c. but the comparison will not hold; for it is not so easy to pay off the mortgage as to make an entry; for the mortgagee is by the rules of this court entitled to six months time, &c. But the objection will be fully answered by considering, That it holds equally strong to his being tenant by the curtesy of a trust estate, or of money to be laid out in land. Nay, the husband might easier and sooner obtain a decree in those cases than this; for here the nature of the case requires time to pass a long account; and in that case of *Sweetapple* and *Bendon* it was not thought to be a sufficient objection.

It was further said, That the husband might by this means suffer the interest money to run on, and by that means throw a heavy load upon the heir; but I do not apprehend what force there is in this objection; for, during the life of the wife, they being absolute owners of the land, and her heirs being in herself, she had power to do as she pleased in that respect; and after her death the heir will have the same remedy in this court against tenant by the curtesy to keep down the interest, as he would have against any other tenant for life.

As to the second objection, it will prove too much, for it has been determined, That the wife shall not be endowed even of a mere trust estate, and yet it is allowed that of such estate the husband shall be tenant by the curtesy. Indeed how that difference came to be at first settled, it might be hard to find a good reason; but since it is so, we must follow what has been determined; though I cannot help saying, if an alteration were to be made, it should be, by allowing the wife to have her dower in such case, and not refusing the husband an estate by the curtesy. But this
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hardship upon the wife is only in case of a mortgage in fee; for, where the mortgage is for a term only, she will have the aid of this court: the reason the court has gone upon to refuse the wife dower of such an equity of redemption, has been in pursuance of disallowing it of a trust estate, but the reason holds contrary as to husband's being tenant by the curtesy.

*As to that case cited of *Pendrell v. Hulse*, [*quare, Penville v. Luscombe?* See 1 *Atk.* 604. S. C. cited 7 *Vin.* 160.] (1) 4th of February, 1728; the question was, Whether there should be a possession *fratris* of an equity of redemption; the Master of the Rolls took time to consider, but there never was a determination.

This case was put at the bar: Suppose a feme sole conveys in fee subject to redemption on payment of a sum of money by her or her heirs, she marries, has issue and dies before the day; and then the heir comes and pays the money; shall the husband be tenant by the curtesy? Now, if the nature of the conveyance was only as a security for money; it is the same case as this: but if intended as a mere purchase subject to a bare condition, most clearly he will not, for that would be to make the husband tenant by the curtesy of a condition, of which there can be no tenancy by the curtesy. But this case stands upon different rules and reasons; and therefore I am of opinion, That the defendant *Inglis* is entitled to be tenant by the curtesy of the mortgaged premises (2).

(1) It is observed, 1 *Atk.* 604, n. (2), that this case is said to be misrepresented, and does not warrant the case said to be determined by it. 1 *Bro.*

C. R. 327. See 2 *Vern.* 525.

(2) *Reg. Lib. A.* 1737. fol. 408. In the report of the same case, 1 *Atk.* 603, the arguments of counsel appear.

HILARY TERM,

11 Geo. II. 1737. B. R.

Sir WILLIAM LEE, Knt. Chief Justice.
 Sir FRANCIS PAGE, Knt.
 Sir EDMUND PROBYN, Knt. } Justices.
 Sir WILLIAM CHAPPLE, Knt.
 D^UZZEY RYDER, Esq. Attorney-general.
 JOHN STRANGE, Esq. Solicitor-general.

BOSWORTH *versus* HERNE.

2 Stra. 1085. [S. C. but not so full.] Andr. 91.

HABEAS Corpus cum causa, directed to the mayor, aldermen, and sheriffs of London.

They return, That the city of London is, and has been time out of mind an ancient city and body corporate; and that in the same city there has been, during all the time aforesaid, a custom, that the mayor, aldermen, and commons of the said city, have and ought to have the rule and oversight, and the right of regulating, ordering, and disposing of all cars, drays or brewers carts, and of all persons working such cars, drays or carts within the said city and liberties, for the preventing of annoyance in the streets, lanes and common passages of the said city. That in the same city there always hath been a laudable custom, That if any customs are hard or defective, or any thing new arises in the said city wanting amendment, the mayor and aldermen of the said city, with the consent of the commons in common council, have used to ordain a convenient remedy for the common good of the citizens and others resorting to the

Bye law that no drayman or brewer's servant shall be in any of the streets of London after certain hours, good.

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the said city; so as such ordinances were consistent with true faith and reason, and *not prejudicial to the King and his people, nor contrary to the laws and statutes of *England*, which said customs, and all others have been confirmed by the stat. 7 Ric. II.

They further return, That in a common council held according to the custom of the said city upon the 10th of *October*, 15 Car. II. it was enacted, reciting, That the streets are annoyed by drays, &c. standing, whereas their work might be done time enough before the streets come to be filled with coaches and passengers, it enacts, That no drayman or brewer's servant shall be allowed with his dray in any the streets, lanes, or common passages of the city, in any day from *Michaelmas* to *Lady-day*, after the hour of one in the afternoon, and from *Lady-day* to *Michaelmas*, after the hour of eleven in the forenoon; upon pain that every person found working with his dray, contrary to the true intent and meaning of this act, shall forfeit and pay for the first time 20s. and for the second and every time after 40s. which said pains and penalties to be recovered by action of debt, bill or information in the name of the chamberlain of the city in the court before the mayor and aldermen; and after every recovery, one moiety to be to the informer, and the other to the poor of the several parishes of the city; in ~~which~~ suits no essoin or wager of law shall be allowed, and the chamberlain shall recover his ordinary costs against the offender; that the said act was made and published in due form according to the custom, and is now in full force, and that the restriction thereby imposed, was and still is expedient and necessary for preventing obstructions, and for the good government of drays within the said city.

They return further, That before the coming of the writ, *Thomas Herne* the defendant was taken within the same city, and detained in the prison of our Lord the King, in the custody of the sheriffs at the suit of *Jahn Bosworth, Esq.* the chamberlain, by virtue of a bill original upon the said act of common council, the tenor of which bill they insert, and that the said bill remains still undetermined, and that is the only cause, &c.

Upon this return the court was moved for a *procedendo* in behalf of the plaintiff; but the court thinking it proper for a solemn argument, it was put into the paper for that purpose; and it was accordingly argued in *Hil. Term*, 1736, by Serjeant *Bootle* for defendant, and by *Garret*, Common Serjeant for plaintiff, and afterwards by Serjeant *Eyre* for defendant, and Serjeant *Chapple* for plaintiff, and by *Strange*, Solicitor General for defendant, who attended upon notice given by order of the court to Mr. Attorney-General, lest any thing might pass to affect the revenue of excise, and Mr. *Noel* for plaintiff.

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*Two objections were made to this bye-law on behalf of the defendant.

1st Objection, That it is void by the common law, it being in restraint of trade; for according to *Waggoner's case*, 8 Rep. 241; such bye-laws only are good as are reasonable, not prejudicial to the
 King

King or his people, nor to the laws of the land; now this bye-law cuts off from the brewer the exercise of his trade eight hours in the twenty-four; and it restrains his servant likewise from his labour half the day. There were cited *Moore*, 411; Bye-law of *London* to make an apprentice's indenture, being the son of an alien, void. *Godb.* 107; Bye-law, That the citizens use nothing but *Thames* sand, void. And though it was admitted, That a bye-law to restrain the number of carts in *London* be good according to the cases 1 *Vent.* 21; *T. Raym.* 288; 1 *Sid.* 324: That is, because those carts only which carry for hire are restrained; but this law is to restrain the brewers from carrying their own goods.

2d Objection, That this bye-law is void, as being contrary to the stat. 15 *Car. II. c. 11, s. 11*; which enacts, That no common brewer shall sell, deliver, or carry out any beer or ale to his customers in any city, town corporate, &c. before notice given to an officer of excise, but between three in the morning and nine in the evening from *Lady-day* to *Michaelmas*, and between five in the morning and seven in the evening from *Michaelmas* to *Lady-day*, upon pain that every brewer doing contrary shall forfeit, &c. This was urged to be by implication a liberty given by act of parliament to the brewers to carry drink at the times mentioned in the act, and cannot therefore be restrained by a bye-law. That 1 *Sid.* 288, it is holden, That though the privileges of *London* are confirmed by act of parliament, yet the king may dispense with them by his charter; much more then shall an act of parliament. And there is but one case where the custom of *London* is good against an act of parliament, and that is the custom to devise in *mortmain*; but the reason of that is given in the book 7 *Hen. VI. 2 Bulst.* 187, because their customs were confirmed after the statute of *mortmain*, and the confirmation had relation to their former customs and usages.

On the other side, as to the 1st objection it was answered, That this bye-law is reasonable, because it is made to keep the streets free and open, which is necessary in a trading city, That this is not to restrain, but regulate trade. So a bye-law, That the bricklayers shall not plaister with lime and hair, but only the plaisterers, is good, *Palmer*, 395, c. 5. *Hardres*, 56. So the case of *Player v. Jenkins*, to restrain the number of carts is a good bye-law, 1 *Sid.* 284. So 5 *Co.* 62, [for the payment of hallage], and 1 *Roll. Abr.* 365, pl. 9, That none shall use hot presses *in the city is good. So to regulate the porters, as in the case of *Fazakerly and Wiltshire* (1).

As to the 2d objection, it was said, That the statute being made to prevent impositions and frauds upon the excise, this bye-law will be quite agreeable to it, and help to carry it further into execution.

When this cause was first spoke to in *Hilary* term, Lord *Hardwicke* was upon the bench, and inclined that the bye-law was good;

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(1) *Str.* 462. 10 *Mod.* 358.

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good ; and said, This bye-law is certainly in some degree a restraint on trade, and therefore it may be too much to say it would be good without a custom to support it ; for a bye-law in restraint of trade without a custom is not good ; but if founded on a custom it may ; now this seems to me to be a bye-law made under and to enforce the custom set out ; and the question is therefore, Whether it is properly made for enforcing the custom and carrying it into execution. The case of *Player and Jenkins* [1 Sid. 284] went a good way ; and I do not see this goes further, for there it might be said, That a man's trade might encrease so as to want carts. It is certain this working of drays may be a nuisance ; as to the statute to be sure, if a statute were made inconsistent with the custom, it would be so far a repeal of it ; but here nothing is laid in the custom which is against the act ; the act is not, That they shall work ; but in the negative, That they shall not work but between, &c. Indeed if the act had been in the affirmative, the bye-law might be inconsistent with it. And now this term, after the argument,

Lee, C. J. The statute has no influence upon the present question, being made for a particular purpose, viz. for the better and more easy collecting the excise duties, and preventing the carrying out beer in a clandestine manner. And as to so much time as the brewers are not deprived of by the act of parliament, it is not to be considered as an affirmative, that he shall work, but it is left as at common law. If there is a custom to regulate any part of trade, and a bye-law agreeable to that custom ; if the bye-law be reasonable, it is in that respect good ; where the exercise of trade is in its nature a nuisance, the interposition of this authority in order to prevent it is very proper. No doubt the general rule of bye-laws is, That they must be reasonable and not prejudicial to the king or subject ; but when the subject matter of a law is the prevention of nuisances, the consideration must be upon the convenience in general, taking in the crown, the party, and the people ; and where the general convenience is greater than the inconvenience, the bye-law may be proper and reasonable. From the cases cited it is plain, That for the prevention of nuisance, trades may be restrained ; as tallow-chandler *from setting up his trade in *Cheapside*, March 15. And it has always been held, that the city of *London* may restrain the setting up of taverns in particular places, and yet they are restraints of trade ; and therefore it comes to this consideration, Whether the provision of this bye-law is reasonable in order to prevent the stoppage of the streets.

As to there being no exception of cases of necessity, necessity is an exception implied in all laws, and in the case of the city of *London v. Vanacre*, it is so holden ; and the defendant may have advantage of such necessity in the action : Therefore this bye-law is good.

Tot' Cur' accord' Rule for a procedendo (1).

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(1) See 1 Str. 675.

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ACTION upon the statute of *hue and cry*, wherein plaintiff declares, that certain malefactors unknown robbed him, and took his goods and money to the value of £30. That he immediately gave notice of the robbery to the inhabitants of *H.* a village next adjoining; and, likewise gave notice thereof to a constable of *K.* being a town likewise near the place, and described the robber; and, likewise within 20 days, caused notice to be given thereof in the *London Gazette*: and, that he went before *Samuel Clark*, secondary to *Edward Ventris* the chief clerk, to enrol pleas in this court, and entered into a bond with two sufficient sureties to *J. H.* the high constable of the hundred of *Ossulston*, conditioned to pay him costs if he should be nonsuit or a verdict against him, &c. and that after the expiration of 40 days after notice given in the *Gazette*, and within 20 days before the commencement of the action, he went before one of the justices of peace for *Middlesex*, and being examined upon oath did swear, That he did not know the robber, &c. notwithstanding which the inhabitants of the said hundred have not found out the robber or paid the damages, &c. contrary to the form of the statute in that case provided.

Defendants pleaded the general issue, and there was a verdict for plaintiff.

N. B. By the stat. 27 *Eliz. c. 13*, it is enacted, That no person shall maintain an action upon the statute of *hue and cry*, unless he does with convenient speed give notice of the robbery to some of the inhabitants of some town, village, or hamlet near the place, nor unless within 20 days before the bringing thereof he be examined upon oath before some justice of the peace of the county inhabiting within the hundred, whether he knew the party that committed the robbery.

And by the stat. 8 *Geo. II. c. 16*, it is enacted, That he shall not maintain his action, unless, besides the notice already required, he gave notice of the robbery with convenient speed to one of the constables of the hundred, or to some constable of some town, &c. near the place, or leave notice in writing at the constable's abode, describing the robber and the robbery, and shall also within 20 days after the robbery give notice in the *London Gazette*, describing the robbery; and shall also before commencing the action go before the chief clerk or secondary, or filazer of the county, or the clerk of the pleas of that court where the action is to be brought, or their respective deputies, &c. and enter into a bond to the high constable or high constables of the hundred, with two sureties for payment of costs if he be nonsuit or verdict against him,

Declaration upon the statute of *Winton* rightly concludes, "contrary to the form of the statute," &c. and this, although there be several statutes upon the same subject.

"Before *S. C.* "secondary," &c. "to *J. H.* "high constable," &c. "before *J. S.* justice," &c. are sufficient without stating them to be then secondary, high constable, &c. Averment that there was but one high constable unnecessary. *Venire*, although *de corpore comitatus*, sufficient.

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him, &c. and that no hundred shall be chargeable if one or more of the felons be apprehended within 40 days after notice in the Gazette.

Hereupon in arrest of judgment several exceptions were taken.

1st, That this being laid to be contrary to the form of the statute in the singular is bad, and ought to be plural contrary to the form of the statutes, and so are the precedents. *Rastall*, tit. *Hue and Cry*.

2d, That the person before whom the record was taken is not stiled deputy to the chief clerk, as the act stiles him, but secondary, so that he does not appear to be the proper person. And that it is not averred, that even he was secondary at that time, for he might not be then so, though he was when the action was brought.

3d, That there be more high constables than one, and therefore it should be averred there were no more than him to whom the bond was given.

4th, That it should have been averred, That the justice of peace was such at the time of the examination on oath.

5th, And which was chiefly relied on, That the *venire* is misawarded, it being to the county at large; for the statute for amendment of the law, which directs the *venire* shall be so, except all cases of actions upon penal statutes, and this is a penal statute, for the statute of *Winton* calls it a pain upon the hundred, and the stat. 27 *Eliz.* when it declares, that the hundred shall be free upon apprehending the robber by fresh pursuit, says they shall not incur the penalty; and if it was only a remedial law to the party, the actions upon the statute ought not to be as they always are *qui tam*; for a *qui tam* action upon a remedial law only is bad, *Cro. Eliz.* 621, *Johns v. *Carne*; and it is not the less a *qui tam* action, that the whole penalty is given to the party grieved, for the king is joined, because he is entitled to a fine for the breach of public law; as in the case of an action upon the statute for a false return of a member of parliament. 5 *Mod.* 311, *Norris v. Mawditt*: and 2 *Salk.* 305, *Coundell v. John*.

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Besides, as the *venire* is to the county at large, the jury may come even from the very hundred which is liable; and therefore the *venire* ought to have been awarded to the adjacent hundred.

And though the want of a *venire* is helped by the stat. of *Jeofails*, yet a bad *venire* upon the record is not helped. *Cro. Eliz.* 605, *Earl of Worcester v. Paddon*.

As to the 1st exception it was answered, That this very exception was disallowed in the case of *Andrew v. The Hundred of Lewkner*, *Yelv.* 116; because the second action is only founded on the statute of *Winton*, and the other actions only restrain the manner of suing.

As to the 2d, That the officer is described according to the statute, and being on record they will take notice he was then officer, but however that is cured by the verdict.

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As to the 3d, The act speaks in the disjunctive high constable or high constables, and we having complied with part of the disjunctive it is sufficient, and saying he entered into a bond to the constable is averring that he was so at that time.

As to the 4th, The saying he went before *A.* one of the justices, is sufficient averment that he was a justice then. And so the precedents are, *Rastall Entr.* 406: *Co. Entr.* 348: *Vidian Entr.* 210.

As to the 5th, This is not a penal statute, but only to give the party his damages.

Lee, C. J. As to the 1st Exception, The answer that has been given to it seems to me to be a right and full answer, and is agreeable to the case in *Yelverton*; for the action is founded only upon the statute of *Winton* (1), and the subsequent acts of parliament (2) do not entitle the plaintiff to the action, but only restrain him in the manner of suing (3).

As to the description of the officer, the act of parliament only describes him shortly, and in the declaration they have enlarged it, and given a right description of his office, so that I think there is no weight in that objection.

*As to its not being set forth, That the constable and justice of peace were such at the time of the bond and oath, though there may be precedents where it is done; yet no case has been cited to say it is necessary in a declaration; and this case is the stronger, being after a verdict when it must be proved at the trial, that he was so. It is true indeed, that an indictment for forcible entry has been holden to be bad for saying only *existens liberum tenement'* without averring that it was his land at the time of the disseisin; but yet in the case of *The King v. Ward* † in this court in an indictment for forgery, That the defendant *existens onerabilis*, and with an intention to defraud the Duke of Bucks, did forge a certificate to deliver some allum, &c. and exception was taken that he was not said to be an *onerabilis* at the time of the forgery; but after solemn argument, the indictment was holden sufficient, because that amounted to an averment, that he was chargeable at the time of committing the forgery (5).

As to the *venire*, and this being a penal action, I must confess I never apprehended it to be so; and there was a case in this court of *Smith v. Phillips, Michaelmas, 4 Geo. I.* ‡, where in an action

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† † *R. Raym.* 1461. 2 *Stra.* 747. ‡ *Stra.* 136. *Lill. Ent.* 254. *Com. R. Bernard. B. R.* 10. (4) 279. *S. C.*

(1) 13 E. III. *stat.* 2, c. 1, 2.

(2) 28 E. III. c. 11. 27 *Ediz.* c. 13. 8 *Geo. II.* c. 16.

(3) 2 *Wms. Saund.* 377, n. (11).

(4) And see the note subjoined to the case in *Lord Raymond*, by the very learned editor of the last edition.

(5) 2 *Wms. Saund.* 376, n. (5).

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action brought against an officer for refusing to deliver a copy of the poll, upon the statute of *Will. III.* which subjects him to a penalty of £500; and upon a motion to amend, it came to be questioned, Whether it were a penal action or not, for it was an amendment upon the statute of amendment after a writ of error in the Exchequer chamber; and the court held, That where an act of parliament only gives a remedy to the party grieved, that is not to be considered as a penal action; it is true indeed that in actions grounded on general statutes, it is necessary they should be *qui tam*, and that was so; but the court, after great debate and consideration, held it ought not to be considered as a penal action, and so gave leave to amend; so that I think this is not a penal action, and without the exception of the stat. 4 *Anne* (1).

As to what was said, that some of these defendants may happen to be on the jury; if it be so it is a cause of challenge, which is an answer to that exception.

Probyn, J. accord. But *Page* and *Chapple, JJ.* doubting if it were not a penal action, it was adjourned to another day, and then both agreeing with the chief justice, judgment was given for the plaintiff (2).

(1) 2 *Wms. Saund.* 376, E. n. 7.

(2) For a luminous view of the lead-

ing cases in relation to this hazardous action, see *Wms. Saund.* 374—380, nn.

EASTER TERM,

11 Geo. II. 1738. B. R.

Sir WILLIAM LEE, Knt. Chief Justice.
 Sir FRANCIS PAGE, Knt.
 Sir EDMUND PROBYN, Knt. } Justices.
 Sir WILLIAM CHAPPLE, Knt. }
 DUDLEY RYDER, Esq. Attorney-general.
 JOHN STRANGE, Esq. Solicitor-general.

SABBARTON *versus* SABBARTON.

Andr. 333. C. T. *Talb.* 249, 250. 2 *P. Wms. Rep.* 699, in notes. [S. C. and more full, *Andr.*]

UPON hearing two causes in Chancery before the late Lord *Talbot*, on the 15th of November, 1736; one between † *Jane Sabbarton*, an infant, by her next friend, plaintiff, and *Benjamin Sabbarton*, *R. Kidwell*, and *Thomas Diggles* and his wife, and other defendants; and the other between the said *R. Kidwell*, plaintiff, and the said *Thomas Diggles* and his wife, *Jane Sabbarton* and *Benjamin Sabbarton*, and others, defendants; his lordship ordered, that a case be made for the opinion of the court of King's Bench upon the following will of *Joseph Sabbarton*, deceased; and directed, That the bequest of the orphan stock and bank stock therein should be considered as a devise of a term; and for this purpose a case was stated for the opinion of this court to the following effect.

Where money in the orphans fund and bank stock was limited by the testator in trust for such of his brother's children then unborn as should attain their age of twenty-one, it was adjudged a good executory devise.

Joseph Sabbarton, the testator, made his will, dated 20th April, 1710; and thereby int' al' devised as follows.

" *And whereas a marriage is proposed to be had and solemnized between *Cath. Corr* and *Benj. Sabbarton junr*. Now I hereby devise and bequeath unto the said *Thomas* and *John*
 " *Young*,

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† *Cas. Temp. Talb.* 53, 245.

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" *Young*, and the survivor of them, and the heirs, executors and administrators of such survivor, all that my freehold house, land, &c. at *A*; and also the sum of £287 in the orphan's fund of the chamber of *London*, and the interest, produce and increase of the same fund that shall be due at the time of my decease, or shall afterwards become due and payable, and also the sum of £350 capital stock in the corporation of the Bank of *England*, and all money due therefrom at my decease, to and for the several uses, trusts, intents and purposes hereafter mentioned, limited and declared (that is to say) in trust that the said *T. B.* and *J. Y.* shall pay, or cause to be paid, all and singular the said rents, issues and profits of the said land and stocks to the said *Cath. Corr* if living at the time of my decease, and not otherwise, for and during the term of her natural life, and unto such person as she shall by any writing under her hand direct and appoint, with or without the consent of any husband she may have; and whether the now proposed marriage, or any other, do or do not happen.

" But in case the said *Cath. Corr* do marry the said *Benjamin Sabbarton*, then the said *T. B.* and *J. Y.* shall from and after the decease of the *Cath. Corr* stand seised, interested and possessed of the premises in trust for the said *Benjamin Sabbarton junr.* for his life, and

" From and after his decease, then in trust to and for the first son lawfully begotten of the said *Cath. Corr* and *Benjamin Sabbarton*, and the heirs male of such first son, and so on respectively to the first, second, third, fourth, fifth, and all other sons of the said *Cath. Corr* and *Benj. Sabbarton*, and their heirs male respectively; and for want of such issue male, then in trust to and for the use and behoof of the daughter and daughters lawfully begotten of the said *Cath. Corr* and *Benj. Sabbarton*, equally to be divided between them.

" And in default of any lawful issue of the said intended marriage, then in trust for all the issue male and female, begotten of the body of the survivor of them equally to be divided between them.

" And in case neither of them shall have any lawful issue, then in trust to and for my sister *Sarah* for her life.

" And from and after her decease in trust to and for the only proper use and behoof of all such child or children lawfully begotten, as my brother *John* shall at the time of his decease leave living, or that his *wife shall then be *ensient* or with child of, that shall live to attain the age of 21 years, and to the heirs, executors, administrators and assigns of such child or children equally to be divided between them share and share alike as they shall respectively attain to the age of 21 years.

" And in case no such child of my brother *John* shall live to attain the age of 21 years, then I devise and bequeath the premises to my own right heirs for ever.

" But

" But in case the said *Cath. Corr* shall not marry the said *Benjamin Sabbarton*, then the trustees shall from the death of the said *Cath. Corr* stand seised and interested in the premises in trust for my said sister *Sarah* for her life; and from her decease in trust for the children of his brother *John* as above, with remainder as above to his own right heirs."

And devises all the residue of his real and personal estate to his said sister and the said *Cath. Corr* for ever, equally to be divided between them.

And appointed *George Vergo* and *Thomas Pilkinton* his executors.

The testator died in *Jan. 1710*. And the trust is now vested in the defendant *Thomas Diggles* and his wife.

The marriage between *Cath. Corr* and *Benj. Sabbarton* took effect after the testator's death.

Sarah, the testator's sister, in 1713, intermarried with the defendant *R. Kidwell*, and died without issue 9th of *August, 1721*; and he is her administrator.

Benjamin Sabbarton, named in the will, died 2d *December, 1718*, without ever having had any issue.

Cath. Corr died 7th *September, 1733*, without ever having had any issue, but first made her will and appointed the said *R. Kidwell* her executor.

John Sabbarton the testator's brother died 19th *November, 1729*; leaving issue two sons *Joseph* and *Benjamin*, who were then both of the age of 21 years and upwards.

Joseph, the eldest of them, died in *Jan. 1729*, intestate; leaving issue only one child the plaintiff *Jane*, an infant, now living.

**Benjamin*, the youngest, one of the defendants, is still living.

Neither the orphan nor the bank-stock have been transferred, but remains now in the same condition as at the time of making the said will.

Quare, If a term for years in lands had been bequeathed in the same manner as the trust of the orphan and bank-stock is limited by this will, whether the limitation to such child and children be gotten, as the testator's brother *John* should at the time of his death leave living, or that his wife should be *ensient* or with child of, that should live and attain the age of 21 years, and to the heirs, executors, administrators, and assigns of such child or children, equally to be divided between them share and share alike, as they shall respectively attain the age of 21 years, would have been good in the case that has happened? and it was certified that the limitation would be good as the case happened. 2 *Peer Wil.* 631. *Talbot*, 250. *Andrews*, 335, &c. and so decreed by Lord *Hardwicke*, Rep. 2 *Peer Wil. Rep.* 699, in notes, contrary to Lord *Talbot*, 57, 58.

WM. LEE.

F. PAGE.

E. PROBYN.

WM. CHAPPLE.

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In the argument of this case at the bar, the following cases were cited in support of this limitation to the children of the testator's brother, viz.

*Higgins and Dowler, Michaelmas Vacation, 6 Ann. 2 Vernon, 600. S. C. Salk. 156.* by the name of *Higgins v. Derby*, limitation of a term in tail, if it ever take effect, the remainders over are void; but if the estate never vests the remainder over is good.

*Target and Gant, Pasc. 1718 †.* Devise of a term to his son *H* for his life, and after his death to such of his issue to whom he shall devise it, but if he dies without issue then to his son *G* during the residue of the term. *H* died without issue or making any disposition of the term; and decreed, That the whole term did not vest in *H*; for, though in case of inheritance, if land be devised to one, and he die without issue, &c. the first devisee takes an estate-tail by implication, which shall go to his issue in a course of descent to all succeeding generations, yet to make such a construction in case of a term which cannot come to the issue by descent, is unnecessary; and, therefore, it shall be intended, only if he die without issue living at the time of his death; and, consequently, the dying without issue being \*confined within the compass of a life, hinders not the remainder over.

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*Stanley and Lee, 16th July, 1794 ‡,* before the Master of the Rolls. *D. Leonard* being possessed of a term of 500 years devises to *Fran. Lee* for life, remainder to his eldest son and his heirs male, remainder to his second son in like manner, remainder for default of such issue to the plaintiff. The devisee for life died without ever having any issue; and the Master of the Rolls relying on that case of *Higgins v. Dowler*, [cited above] § was of opinion, that the limitation over to the plaintiff was good; for to make it a bad limitation, it must have been contended, that it would create a perpetuity, that is, when it will render the estate unalienable longer than the continuance of a life or lives in being, or a reasonable compass of years; but here if the first son had ever taken at all, he would have had the whole and might have disposed of it (1).

† Eq. Cas. Abr. 193. pl. 11. *Gilb.* § 2 *Vern.* 600. pl. 538. 1 *P. Wms. R.* Rep. 149. 10 *Mod.* 42. 1 *P. Wms. R.* 98. pl. 21. *Salk.* 156. pl. 8. 2 *P. Wms. R.* 432. pl. 121. cited in *Fitzgib.* 317. R. 694. See *Fitzgib.* 320. S. C.  
‡ 2 *P. Wms. R.* 686.

(1) The principle of this case has given rise to much variety of comment, as will be seen on reference to the modern editions of the several reports here cited, particularly those of *Peers Williams*, edited by Mr. Cox. See also *Fearne on Contingent Remainders*, by Mr. Butler, who has subjoined, page

434, n. (a), a historical view of the question, referring to 7 *T. R.* 100, and 3 *Fra. Vesey*, 486. 4 *Fra. Vesey*, 35. *Sug. Law of Vendors and Purchasers*, 356. n. Stat. 39 & 40 Geo. III. c. 3. See also the same book, pa. 522, n. (1). 524, n. (1).

# DIGESTED TABLE

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2. Where both baptismal and surname of the defendant are mistaken he may plead that he is called by his proper name, and surname; and held both one name and not a double plea: and it is not necessary that the plaintiff should in such a case aver that he was baptised by a name other than that by which he was sued. *Read and Matteur*. T. 9 G. II. 286
3. In an action on the case for suing the plaintiff in the Admiralty, for part of a ship belonging to the plaintiff and another; and where, in such action, the detention of the whole ship was deemed to be alleged in the declaration by way of consequential damage, held, that the defendant shall not be at liberty, on account of a joint injury sustained by the detention, to plead the non-joinder of the other owner in abatement; for the suing the plaintiff personally in the Admiralty was the gist of the action. *Smith Qui tam, versus Gibson*. T. 9 G. II. 271

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3. In trover for stolen goods, the plaintiff must identify them to be those stolen from him. *Harris versus Shaw*. M. 10 G. II.

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4. If the party know that he has been robbed of the goods, he must, in order to obtain restitution [under the statute 21 H. VIII.] first prosecute the felon. *Id.* *ib.*
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See ABATEMENT, No. 1. EXECU-  
TOR, No. 1.

## ADMIRALTY,

*Suing in the Admiralty contrary to  
the Statute.*

See DAMAGES, No. 1.

## AFFIDAVIT.

1. Affidavit of the cause of action cannot be taken by the plaintiff's attorney. *Dodd and Adcock*. H. 9 G. II. 211
2. Affidavits are the records of the court, and every subject has a right to a copy of them. *The King v. Duffin*. M. 9 G. II. 158 and See PRACTICE, No. 17.
3. Affidavits must be filed in time. *The King v. Duffin*. M. 9 G. II. 158

## AGENT.

On a bill of exchange describing the drawee as a servant or agent, a general acceptance will bind him personally. *Thomas and Bishop*. M. 7 G. II. Page 1

## AMBASSADOR.

See PRIVILEGE, No. 4.

## AMENDMENT.

1. The plaintiff has his election either to pay costs on amending his declaration, or give an imparlance. *Ward and The Charitable Corporation*. T. 8 G. II. 126
2. In ejectment the time of the demise may be enlarged by consent. *Thrustout on Demise of Turner versus Gray*. M. 9 G. II. 165
3. An information cannot be amended by what appears on the return to the *certiorari* by which such information may have been removed. *The King versus Holmes*. E. 10 G. II. 365
4. Judgment for the demandant in dower allowed to be amended after error brought, by striking out one of two averments inserted therein. *Bern and Bern*. M. 8 G. II. 72
5. Rejoinder in the paper book allowed to be amended by the draught signed by counsel. *Anonymous*. H. 9 G. II. 205
6. Writ of error amended [in the style of the court to which it was directed.] *Collins and Muxworthy*. H. 9 G. II. 194
7. Where the writ of enquiry was against two defendants, and the declaration against three, the court refused to set aside the writ for irregularity, but allowed the party to amend on payment of costs, and the record of the judgment by default held a warrant to amend by. *Condren and Coulter and Others*. M. 10 G. II. 314
8. Matter

AMENDMENT, (*continued.*)

8. Matter of irregularity, carries costs. *Conden and Coulter and Others.* M. 10 G. II. Page 314
  9. Where plaintiff has lost a trial, defendant will not be permitted to amend his plea. *Jordan and Twells.* M. 9 G. II. 171
- See ERROR, No. 1. QUO WARRANTO, No. 2. SCIRE FACIAS, No. 1.

APPEARANCE.

See CONTEMPT, No. 1. PRACTICE, No. 3, 4, 5.

APPRENTICE.

1. But an apprentice cannot be discharged without appearance or summons of the master. *Arglis and Heaseman.* E. 8 G. II. 101
  2. "Using" the apprentice "unkindly" not a sufficient reason for discharging him. *Id.* *ib.*
  3. Although the 5 *Eliz. c. 4*, make all apprenticeship in corporate towns for less than seven years void, yet indentures for a less time are voidable only as between the parties. *The Inhabitants of St. Nicholas and St. Peter's in Ipswich.* M. 10. G. II. 323
- See APPRENTICESHIP, No. 1. JURISDICTION, No. 2. SETTLEMENT, No. 1, 2.

ARBITRATION.

See AWARD, No. 2. COSTS, No. 1. 9. 10.

ARBITRATOR.

Where an arbitrator takes money, whether for charges or any thing else, before making his award, it will be set aside. *Shephard and Brand.* T. 7 G. II. 53

See AWARD, No. 2. COSTS, No. 1. 9, 10.

ARREST.

A defendant arrested and in custody, but superseded for want of being charged in execution, cannot be held to bail in an action of debt upon the judgment. *Hall and Howes.* E. 9 G. II. Page 244

See PRIVILEGE.

ARREST OF JUDGMENT.

See CUSTOM.

ARTICLES OF THE PEACE.

See HUSBAND AND WIFE, No. 1.

ASSETS.

Where an executrix pleads certain outstanding bonds given by her testator, the day of payment of the sums mentioned in the conditions of which is past, and pleads other outstanding bonds, the day of payment of the sums mentioned in the condition of which is at the time of the plea to come, the penalties of those bonds in which the day of payment is past, and the sums mentioned in the conditions of those in which the day of payment is to come, are liens on the assets. *The Bank of England v. Catharine Morrice, Widow, Executrix of Humphrey Morrice, deceased.* H. 9 G. II. 219

See JUDGMENT.

ASSUMPSIT.

*Quantum meruit* will not lie for the use of a house if there be a demise proved; but *indebitatus assumpsit* lies where there is an express promise to pay rent grown due, proved. *Valet versus Tyler.* T. 9 G. II. 282

See PROMISSORY NOTE. SHIPPING, No. 2.

ATTACH-



## ATTACHMENT.

1. Attachment for a contempt lies for disobedience to a Judge's warrant. *The King and White and Others*. T. 7 G. II. Page 42
  2. On moving for an attachment for not obeying a *subpoena*, an affidavit as well of tendering the shilling, as of reasonable charges, is necessary. *Wakefield's Case*. M. 10 G. II. 313
  3. Rule to shew cause why an attachment should not issue for not obeying an order of sessions confirmed in *K. B.* made absolute. *The King versus Holland*. M. 9 G. II. 160
  4. Attachment against a deputy town clerk for taking an affidavit of the cause of action, he then acting as attorney for the plaintiff, refused. *Dodd and Adcock*. H. 9 G. II. 211
  5. If the party bring an action on an award, he is precluded from moving for an attachment for non-performance. *Stock and Huggens and De Smith*. E. 8 G. II. 106
- See CONTEMPT. WARRANT OF ATTORNEY, No. 2. WITNESS, No. 13.

## ATTORNEY.

1. The plaintiff's attorney must carry in the roll. *Whiter q. t. and Groombridge*. E. 8 G. II. 103
  2. An attorney may, at his own request, be struck off the roll. *Kidwell's Case*. E. 9 G. II. 232
- See AFFIDAVIT, No. 1. ATTACHMENT, No. 4. CONTEMPT, No. 1. PRIVILEGE, No. 3. VENUE, No. 1. WARRANT OF ATTORNEY, No. 2.

## AVERAGE.

See PLEADING, No. 1.

## AVERMENT.

See PLEADING, No. 2. 16.

## AWARD.

1. Rule to set aside an award before it be made a rule of court, refused, on the ground, that until then, it is not before the court. *Anon.* E. 9 G. II. Page 232
2. The facts of the case submitted to arbitrators are to be fully laid before them, and if there has been any industry or art used by either of the parties to conceal, it is sufficient to make void the award. *Metcalf versus Ives and Johnson*. T. 10 & 11 G. II. 382

See ARBITRATOR. ATTACHMENT, No. 5. COSTS, No. 1. 9, 10.

## B.

## BAIL,

*Common Bail.*

See PRACTICE, No. 1.

*Special Bail.*

Surrender of principal on the return-day of the *sci. fa.* against the bail, held good. *Galton and Wigley*. H. 9 G. II. 208

*Bail in Error.*

See ERROR, No. 11.

*Striking Bail out of Bail-piece.*

See WITNESS, No. 9.

## BAIL BOND,

*Staying Proceedings on.*

See PRACTICE, No. 7.

## BANK NOTES,

*Execution.*

See PRACTICE, No. 25.

## BANKRUPTCY.

**BANKRUPTCY.**

1. Where a man becomes bail in error, and before affirmance is made a bankrupt, he is not discharged from his recognizance; for till then the debt is contingent, and not proveable under the commission. *Hockrell and Merry.* E. 9 G. II. Page 262
  2. A creditor of the bankrupt, but who releases the assignees, is a competent witness to prove the act of bankruptcy. *Ambrose and others, Assignees of Ambrose, v. Clendon.* E. 9 G. II. 267
  3. A commission of bankruptcy is well founded upon a bond given for a pre-existing debt, although it appear that the bond were executed subsequently to the act of bankruptcy. *Id.* ib.
- See EVIDENCE, No. 3.

**BARON AND FEME.**

See HUSBAND AND WIFE.

**BASTARD.**

See EVIDENCE, No. 14. SESSIONS.  
—ORDER OF SESSIONS, No. 5.

**BASTARDY.**

See JUSTICES OF THE PEACE, No. 1.  
4.

**BILL OF EXCEPTIONS.**

Bill of exceptions to an order of quarter-sessions does not lie. *The King and The Inhabitants of Preston-on-the-Hill.* E. 9 G. II. 249

**BILL OF EXCHANGE.**

1. Evidence of a parol acceptance of a bill of exchange is sufficient to

**BILL OF EXCHANGE,**  
(continued.)

- charge the drawee as the acceptor. *Lumley and Palmer.* M. 8 G. II. Page 74
2. To charge a drawee of a bill of exchange, there must be evidence of a contract to accept. But evidence that the drawee said he would help the holder if he could, for that he had then some effects; which, after the bill had remained in his hands ten days, he offered the agent of the holder to sell and pay himself, and that the drawee had desired that the bill should be left in order that he might examine into it, is insufficient to prove a contract to accept. *Clavey and Dolbin.* T. 9 G. II. 277
- See AGENT. PLEADING, No. 5.

**BOND,**

See EVIDENCE, No. 15.

*Staying Proceedings in Debt on Bond.*  
See PRACTICE, No. 29, 30, 32.

**BOOKS,**

*Inspection of Books.*

1. Rule to inspect the books of the Charitable Corporation refused; it being doubted *per cur.* whether they were public. *Charitable Corporation v. Woodcraft.* T. 8 G. II. 130
2. Rule to inspect the books of the commissioners of lieutenancy of the city of London, granted. *Edwards and Vesey.* T. 8 G. II. 128
3. In *quo warranto* a rule will be granted to inspect charter and books. *The King versus Hollister.* E. 9 G. II. 245

**BREWERS**

## BREWERS DRAYS.

See LONDON.

## BYE-LAW.

See CORPORATION, No. 6. LONDON.

## C.

## CANONS OF 1603.

See ECCLESIASTICAL LAW.

## CATTLE-GATES.

See EJECTMENT, No. 3.

## CERTAINTY.

A writ of *excommunicato capiendo* in the conjunctive, i. e. for subtraction of tithes and other ecclesiastical duties, held good. *The King versus Turfoot*. M. 10 G. II. Page 314

See INDICTMENT, No. 2.

## CERTIORARI.

1. *Certiorari* granted at the instance of a prosecutor to remove an indictment for a riot from the court of great sessions for *Brecknock*. *Anonymous*. M. 9 G. II. 165
2. Return to a *certiorari* made on paper, quashed. *The King and The Inhabitants of Stow Bardon*. M. 9 G. II. 173
3. In the absence of special circumstances, *certiorari* to remove an indictment from the *Old Bailey* sessions to K. B. refused. *The King versus Ferguson*. E. 10 G. II. 369

CERTIORARI AD INFORMAND.  
CONSCIENT. CUR.

See ERROR, No. 6.

## CESSET EXECUTIO.

See PRACTICE, No. 22.

## CESTUI QUE TRUST.

See DEVISE, No. 3.

## CHARTER,

*Inspection of Charter.*

See BOOKS, No. 3. INSPECTION OF BOOKS.

## CHILDREN UNBORN.

See EXECUTORY DEVISE.

## CHURCHWARDEN.

See MANDAMUS, No. 1. PROHIBITION, No. 6.

## CLANDESTINE MARRIAGES.

See PROHIBITION, No. 8.

## COIN.

See MISDEMEANOR.

## COMMITMENT,

*Commitment of a Pauper.*

See JUSTICES OF THE PEACE, No. 2.

## COMMITTITUR PIECE.

Where it appeared that the defendant had been taken in execution in *Easter* term upon a judgment of that term, it is sufficient if, on production of the roll, the *committitur* is entered thereon of *Easter* term, although the *committitur* piece shall not have been filed till *Michaelmas* term: for a *committitur* piece is only necessary where there is no record of the *committitur*; and where the *committitur* piece is wanting to warrant the entry, such entry may be discharged on motion. *Duchess of Marlborough v. Widmore*. H. 9 G. II. Page 208

CONSO-

## OF THE PRINCIPAL MATTERS.

### CONSOLIDATION OF ACTIONS.

See PRACTICE, No. 10.

### CONSTABLE.

See SESSIONS.—ORDER OF SESSIONS, No. 6.

### CONSTRUCTION OF WORDS.

See WORDS.

### CONSULTATION.

See PROHIBITION, No. 4.

### CONTEMPT.

1. An attorney not entering an appearance pursuant to his undertaking by an indorsement on the writ, incurs contempt. *Williams and Nash*. T. 8 G. II. Page 131
2. Unduly discharging a debtor out of their prison by the judges of an inferior court, subjects them to information or attachment. *Moravia's case*. T. 8 G. II. 135
3. In an action, not to determine a right or controversy, but to deceive the court and to raise a prejudice against a third person, is unlawful, and punishable as a contempt. *Coxe and Phillips*. E. 9 G. II. 237

See ATTACHMENT. CORPORATION, No. 8. DAMAGES, No. 1. WARRANT OF ATTORNEY, No. 2.

### CONTINGENT RIGHT.

II. may on the marriage bar himself of a contingent right to which he would be entitled on the death of his wife. *Metcalf v. Ives and Johnson*. T. 10 & 11 G. II. 387

### CONTRA FORMAM STATUTI.

See PLEADING, No. 8. HUE AND CRY.

### CONVICTION.

A conviction where no summons is stated to have issued, quashed. *The King and Hawker*. T. 8 G. II. Page 130

### CONUSANCE.

Claim of conusance allowed in behalf of the university of Oxford; and such claim should be made *primo die*. *Woodcocke and Brooke*. E. 9 G. II. 241

### CORPORATION.

1. Although infancy in the mayor, bailiff, or other head of a corporation, shall not avoid the deeds or grants of a corporation, because he acts in his corporate, and not in his natural capacity, yet this does not affect the question with respect to members of the corporation. *The King and White*. M. 7 G. II. 8
2. The omission to summon one member to a corporate meeting, avoids the acts of that meeting. *The King v. The Mayor, Aldermen, and Assistants of the Town of Shrewsbury*. T. 8 G. II. 147
3. Although it be undecided whether a burgess having committed an offence indictable at common law, together with a breach of his oath and duty, can be disfranchised previously to conviction of the indictable offence, yet if it appear that an indictment would not have determined the matter, he may be disfranchised for the acts amounting to a breach of his oath and duty. *The King v. The Mayor and Burgesses of Derby*. T. 8 G. II. 153
4. If a corporator be not sworn into his

CORPORATION, (*continued.*)

his office within a reasonable time after his election, it is a waiver of the election. *The King versus Jordan*. E. 9 G. II. Page 255

5. Where persons were householders of houses above the value of £10 a year, and paid scot and lot, but had let part of their houses to lodgers, and thereby reduced their rents to be under £10 *per ann.* held, that they were occupiers of houses, and entitled to vote under the stat. 11 Geo. I. c. 13, for regulating elections in London. *Fludier versus Sir Thomas Lombe*. T. 9 G. II. 307
6. If no penalty be annexed to the breach of a bye-law, no action. *The Mayor and Burgesses of Workingham in Berks, v. Johnson*. T. 9 G. II. 284
7. Where a charter expresses that if the capital burgesses die they are to be chosen out of the secondary burgesses, and if they die, they are to be chosen out of the inhabitants, a bye-law, annexing a forfeiture to the refusal of an inhabitant chosen a burgess to serve, cannot be enforced against a secondary burgess elected to be a capital burgess, but who refused to serve; such bye-law being, indeed, good; yet construed to restrain the penalty to an inhabitant chosen to be a burgess refusing to serve. *Id. ib.*
8. The late mayor is the proper officer of a borough to make a return to a writ of *mandamus*; and if in making such return, whether true or false, as to the matter of fact, he allege that it is the return of others also, when in truth it is not, it is a contempt for which an attachment will be granted. *Tamen quare. The King and Hoskins*. H. 9 G. II. 188

See CUSTOM. FINE. MANDAMUS.  
QUO WARRANTO, No. 1, 2, 3.  
WITNESS, No. 10.

## COSTS.

1. The court will not interfere where an arbitrator, under a rule of reference, awards a particular sum for costs, unless it be excessive, and then only by considering the excess as evidence of undue practice. *Shephard and Brand*. T. 7 G. II. Page 53
2. In ejectment where the lessor of the plaintiff is an infant, security must be given for costs. *Birchman and Noright*. T. 7 G. II. 56
3. Suggestion for double costs against the plaintiff, he being non-suited, allowed upon an affidavit of the facts to be entered on the roll; there being no other way, as the facts were not apparent upon the record for obtaining the double costs. *Barton and Others v. Miles and Others*. T. 8 G. II. 125
4. Where there is a *unica taxatio*, the court will not notice the several capacities of the defendants. *Id. ib.*
5. Costs allowed upon an information for not going to trial. *The King v. James*. M. 9 G. II. 159
6. When the House of Lords directs the court of K. B. to award a *venire de novo*, and omits all mention of costs, that court must award such writ, without imposing costs upon the party through whose default it became necessary. *Kinaston v The Mayor, Aldermen, and Assistants of Shrewsbury in Error*. T. 10 & 11 G. II. 377
7. In proceedings upon a writ of *noctanter*, the court cannot give costs. *The King v. Inhabitants of Glastonby*. H. 10 G. II. 355
8. In *quo warranto* the prosecutor is, upon stat. 4 & 5 W. & M. liable to costs, if he do not proceed to trial within a year after issue joined. *The King versus Howell*. E. 9 G. II. 247
9. Where an arbitrator under an order of *Nisi prius*, awards costs, it shall

COSTS, (*continued.*)

shall be understood as between party and party; not as between attorney and client, unless it be so awarded. *Pratt and Salt*. M. 9 G. II. Page 61

10. An award to pay costs, to be settled by any other than the proper officer, is bad. *Nott and Long*. M. 9 G. II. 181

11. Where in trespass *vi et armis* for taking plaintiff's horse, he recover damages under 40s. he is entitled to full costs. *Harper versus Jiffer*. T. 10 & 11 G. II. 375

See AMENDMENT, No. 1. 7. ERROR, No. 6. 9. EXECUTOR, No. 2. PRACTICE, No. 29, 30. PROHIBITION, No. 11.

## COVENANT.

Where the defendant entered into a covenant to pay a certain rent for a piece of ground, and that the rent should be increased in case an adjoining piece of ground, then in dispute, should be adjudged to belong to the plaintiff, or in case the defendant should by any ways or means come to the possession thereof, and where the defendant did obtain possession thereof from another person to whom he paid rent for the same, held, that in order to entitle the plaintiff to the increased rent, it was not necessary that such adjoining ground should have been adjudged to the plaintiff or obtained by him. *Heath versus Baker*. M. 10 G. II. 319

See PLEADING, No. 14.

## COVERTURE.

See PARTIES TO ACTION.

## COUNTY IN THE MARGIN.

See JUSTICES OF THE PEACE, No. 2.

## CROSS REMAINDER.

See ESTATE, No. 1.

## " CUM PERTINENTIIS."

See EJECTMENT, No. 1.

## CUSTOM.

A "reasonable" fine may mean a certain one. *Moore v. The Mayor of Hastings*. H. 10 G. II. Page 362

See EVIDENCE, No. 10. PLEADING, No. 19. SHIPPING, No. 1.

## D.

## DAMAGES.

1. On a contempt, *sur prohibition*, the damages recovered, are only from the time of the prohibition granted. *Smith v. Gibson*. M. 10 G. II. 317

2. Where in an action brought against overseers of the poor for a distress made by them on 43 *Eliz. c. 2*, they obtained a verdict, but the principal jury omitted to assess the damages, as by that statute directed in their behalf, the court will award a writ of inquiry for that purpose; but a previous suggestion on the roll that the defendants were acting in the execution of their office is necessary. *Valentine and Fawcet*. T. 8 G. II. 138

See ACTION. DOWER, No. 2, 3. MANDAMUS, No. 6.

## DEATH.

See PRACTICE, No. 26. WARRANT OF ATTORNEY, No. 3.

## DEBT,

**DEBT,**

*Action of Debt.*

See JURISDICTION. OUTLAWRY, No. 2. PLEADING, No. 1, 2, 3, 10, 17. PRACTICE, No. 13. REPLEVIN, No. 2.

**DECLARATION.**

1. Where it appeared that several sums had been paid between the first day of the previous term and the day of the subsequent term wherein the *latitat* in this cause was sued out, a special memorandum held necessary, and that it ought to be as of the day the writ was returnable. *Southouse and Allen*. T. 8 G. II. Page 141
2. The want of pledges to a declaration is a ground of special demurrer. [*Tamen quare.*] *Umfreville versus Lock*. M. 10 G. II. 315

**DECLARATION BY THE BYE.**

See PRACTICE, No. 6. REPLEVIN, No. 2.

**DEED.**

See PLEADING, No. 4. AVERMENT.

**DEFAMATION.**

See ACTION ON THE CASE, No. 1. PLEADING, No. 7. CONTEMPT, No. 3.

**DEFEAZANCE.**

See EXECUTION.

**DEMISE FOR A YEAR.**

See LANDLORD AND TENANT, No. 1.

**DEMURRER.**

See DECLARATION, No. 2. PLEADING, No. 1, 9, 26. QUO WARRANTO, No. 2, 3.

**DETAINER.**

1. A prisoner in the *K. B.* at the suit of the King, upon a conviction for a libel, may be charged with civil process, and leave will be granted of course, either by motion in court or a judge at his chambers. *Basket and Rayner*. M. 9 G. II. Page 170
2. Leave granted to charge the defendant already in custody on a charge of felony, with civil process. *Daintree and Justice*. H. 9 G. II. 190

**DEVISE.**

1. Where from the words of the will, it shall be manifest that others, to the exclusion of the testator's eldest son and heir at law, should take certain rents, parcel of a ground rent issuing out of freehold lands, held, that on the events mentioned in the will happening, the reversion of the land itself passed to the exclusion of the heir. *Maudy and Maudy*. T. 8 G. II. 142
2. Where on special verdict it was found that a testator having charged certain legacies upon his lands, devised, that in case his son *T.* should happen to die before he married, or being married should have no children lawfully begotten, then that his lands should remain and descend equally to his daughters and their heirs, paying, &c. except such jointures as his son should happen to make upon his wife, not exceeding, &c.; and that in case both his daughters should die without being married, or being married should have no children of their respective marriages, then he willed that all his estate should descend to his nephew *J M*; that at the end of the will he gave and devised to his son *T* all

DEVISE, (*continued.*)

*T* all his estate real and personal not already disposed of by his will: that after the testator's death his son entered, and suffered a recovery to the use of himself and his heirs, and died without issue; upon which his sisters entered and suffered a recovery, and died without issue; upon which the heir of *J M* entered; it was held, that the son *T* took an estate by devise; and although that might not be so clear, yet that the daughters took an estate in fee, and that the lessor of the plaintiff, the heir of the nephew *J M* was barred by the recovery suffered by them. *Wealthy on the Demise of Manley versus Bosville.* E. 9 G. II. Page 258

3. Under a devise to trustees to their use, to the use of the first and eldest son, not heir at law or inheritor of the real estate of *D* his father, and to the third, fourth, fifth, and every other son of *D*, the second son is described with sufficient certainty, and may take by purchase. But whether the limitation be not void, for the uncertainty who could take in the life-time of *D*, he being found to be living? *Marwood on the Demise of Fennel and Al' versus Darrel.* H. 8 G. II. 91
4. But a papist, under the stat. 10 & 11 Will. III. [now repealed by stat. 18 Geo. III. c. 60;] cannot take by will, for a devisee takes by purchase. *Id.* *ib.*
5. But under such devise the legal estate remains in the trustees, and the son of *D* would take only as *cestui que trust.* *Id.* *ib.*
6. Devise to the testator's son for life, and his heirs male, with remainders over, held, that the words "heirs male," were to be understood collectively, and that one taking in remainder, took an estate tail. *Dubber versus Trollop.* M. 9 G. II.

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## DIMINUTION.

See ERROR, No. 10. INTERIOR COURT.

## DISCONTINUE,

*Liberty to discontinue.*

See PRACTICE, No. 33.

## DISFRANCHISEMENT.

See CORPORATION, No. 3.

## DISGUISED,

*Appearing disguised.*

See FELONY, No. 2.

## DISTRESS.

1. If the outer-door of a house be open, one may break an inner-door to distrain. *Browning v. Dann and Others.* M. 9 G. II. 167
2. A joint distress for two distinct messuages, at two distinct rents, cannot be justified. *Rogers and Birkmire.* E. 9 G. II. Page 245

## DISTRIBUTION.

See ORPHANAGE.

## DOWER.

1. Where a remainder in tail or fee comes to or descends on tenant for life, either by his own act, or the operation of law, the two estates are so consolidated, that it should seem the intermediate contingent estates are destroyed; or, if they do open on the contingencies happening, they are suspended till that time, and the wife of the tenant for life, with such contingent remainders, shall have dower. *Hooker and Hooker.* H. 7 G. II. 13
2. Damages from the death of the husband till the widow have seisin will



DOWER, (*continued.*)

will be given against tenant in a writ of dower *unde nihil habet*, unless he plead no demand of dower made. *Dobson versus Dobson and Others.* E. 7 G. II. Page 19

3. Where there are two joint tenants in dower, and one dies after judgment, upon which his heir and the surviving tenant bring error, the value from the time of the judgment to the affirmance should be against them, and not against the surviving plaintiff in error only. And although such judgment be for the benefit of the heir of the deceased tenant, yet he may join in assigning it for error. And damages from the time of the judgment to the affirmance cannot be computed by the court, but a writ of enquiry, under 16 & 17 Car. II. must be awarded. *Kent and Kent.* T. 7 G. II. 50

See AMENDMENT, No. 4.

## DRAWEE OF A BILL OF EXCHANGE.

See AGENT, No. 1. BILL OF EXCHANGE, No. 2.

## DUPLICITY.

See PLEADING, No. 25.

## E.

## ECCLESIASTICAL LAW.

Lay persons are not within the canons of 1603. *Middleton and his Wife versus Croft.* T. 7 G. II. 57

## ECCLESIASTICAL COURT.

See EVIDENCE, No. 9, 18.

## EJECTMENT.

1. Ejectment for so many acres of land with common of pasture *cum pertinentiis*; the words *cum pertinentiis* held not to extend to common in gross, but to relate to the land. *Baker and Roe.* T. 8 G. II. Page 127
2. Where in ejectment the premises were described to lie in "*vill et terr. de A.*" the words "*et terr.*" shall be rejected, and then "*in vill*" alone, held well enough. *Baker v. Thompson.* M. 9 G. II. 166  
And See ERROR, No. 7.
3. Ejectment for *cattle-gates* cured by verdict. *Metcalf and Roe.* M. 9 G. II. 167
4. Making a defence on trial in ejectment is a waiver of irregularity in the service of the ejectment. *Kempton on the Demise of Boyfield versus Cross.* E. 8 G. II. 108
5. Motion to strike out a defendant; being a material witness, refused. *Berrington and Dormer v. Parkhurst, Fortescue, and Others.* M. 9 G. II. 162
6. Where the plaintiff in error, in ejectment, moves to stay execution, it must be upon payment not only of costs, but also upon payment of the mesne profits; and this, although the action be brought on the recognizance for damages only. *Doe versus Roache.* E. 10 G. II. 373
7. Motion for judgment on an affidavit of the facts attending the sealing a lease on the premises, they being empty, granted. *Bidgood and Hawes.* E. 8 G. II. 112

See AMENDMENT, No. 2. COSTS, No. 2.

## ELECTION,

*Waiver of Election.*

See CORPORATION, No. 4.

ENGLISH,

## ENGLISH,

What proceedings to be in English.  
*Horton and Kilmore.* M. 7 G. II.  
 Page 5

## EQUITY OF REDEMPTION.

See ESTATE, No. 2, 3.

## ERROR.

1. Upon a judgment against two, one cannot bring error.  
 Nor if so brought, can the writ be amended. *Ratcliff and Burton.* T. 8 G. II. 135
2. The Court of K. B. do not require that the return to a writ of error to the court of C. P. returnable in K. B. be signed by the chief justice of C. P. *Blackwood v. The South Sea Company.* M. 10 G. II. 344
3. No diminution can be alledged of record from an inferior court. *Sayer versus Curtis.* E. 10 G. II. 367
4. *Scire facias quare executionem non* cannot be maintained before a rule to transcribe be given, and the transcript returned thereon. *Goodright versus Hugoson.* II. 10 G. II. 351
5. Where in *sci. fa.* against two executors, upon a judgment against their testator, one pleads *ne unques* executor, and the other payment by the testator, and a verdict is found for the plaintiff upon the first plea, and no finding as to the second, but judgment is entered, and execution awarded against both executors, and upon error brought upon such judgment, the defendant pleaded the statute of limitations in error, viz. 10 & 11 W. III. c. 24, the plea was allowed; and it was ruled that on such plea the judgment is, that the plaintiff may be barred of his writ of error: and held, that if an improper judgment be prayed, the court of error may give the proper

## ERROR, (continued.)

judgment. But as to the award of execution, where no finding appeared, the court denied a *venire facias de novo*, on the ground that such writ could not be awarded in error, and therefore reversed the judgment. *Street v. Hopkinson.* M. 10 G. II. Page 345

6. *Certiorari* awarded to remove an original *ad informand. conscient. cur.*, although no diminution alledged. *Franklyn v. Reeves.* E. 8 G. II. 118
  7. Although the record omit to state that the cause was tried before justices assigned to hold the assizes, in and for, &c. yet if it appear by the award of the *venire*, that they were called "justices of assize," it is sufficient. *Baker and Thompson.* M. 9 G. II. 166
  8. Although a particular fact necessary to entitle the plaintiff to recover, do not appear upon the record, yet after verdict, it shall be presumed to have been proved, and the defect shall be cured. *Wicker and Norris.* E. 8 G. II. 116
  9. An executor not to pay costs on the affirmance of a judgment against him on a writ of error, unless the first judgment were given on a false plea. *Saltern Executor versus Wynne Executor.* E. 10 G. II. 367
  10. An entry of a *remittitur dampna* for part of the damages, good upon error, without judgment for the defendant *quod eat sine die* as to that part. *Eyre and Mount.* H. 9 G. II. 207
  11. A *ca. sa.* against the bail, issued subsequent to allowance of a writ of error, will be set aside with costs. *Andrews versus Jernegan.* M. 10 G. II. 315
- See AMENDMENT, No. 6. BANKRUPTCY, No. 1. EJECTMENT, No. 6. INFANT, No. 2. PRACTICE, No. 11. VARIANCE, No. 3. ESCAPE.

## ESCAPE.

Where a prisoner entrusted by the gaoler with the keys, is seen without the gaol, the sheriff becomes liable as for a voluntary escape; to an action of debt, for which, he cannot justify by alleging a recaption: *aliter* had the escape been through negligence. *Wilkinson v. Salter and Perry, Sheriffs of London.* T. 9 G. II. Page 310

## ESTATE.

1. One devised his lands to his granddaughters C and E to be equally divided between them and the heirs of their bodies *respectively*; and for default of such issue, to his other grand-daughter A. C. dies leaving a son. E dies without issue. Held that A and not the son of C by way of cross remainder, took E's moiety. *Comber and Hill.* E. 7 G. II. 22
2. An equity of redemption is an estate in the land. *Casburne and Inglis and al.* In Canc. M. 10 & 11 G. II. 399
3. Foreclosure of an equity of redemption is considered as a new purchase of the land. *Id.* *ib.* See DEVISE, No. 4. DOWER, No. 1.

## EVICTION.

See PLEADING, No. 15.

## EVIDENCE.

1. Letters of administration with the will annexed, prove themselves in a cause relating to personal property. *Kempton on the Demise of Boyfield versus Cross.* E. 8 G. II. 108
2. In order to charge the indorser of a promissory note, it is not necessary to prove a demand made upon the maker. *Tamen quære. Cooper versus Le Blanc.* T. 9 G. II. 295

## EVIDENCE, (continued.)

3. The entries of bills of parcels by the bankrupt himself, *if shewn to have been made before his bankruptcy in his own books*, are evidence of the debt for goods bought by him of the petitioning creditor: *Aliter if not shewn to have been made before the bankruptcy.* *Ewer and Others, Assignees of Winter, v. Preston.* T. 10 & 11 G. II. Page 378
4. Where the issue was, whether the defendant had been discharged under the insolvent debtors act, 2 Geo. II. c. 20, the duplicate of a discharge by the quarter sessions under that act, was held *prima facie* evidence of the fact. *Gillam and Stirrup.* T. 8 G. II. 145
5. Parol evidence not admitted of the purport of written evidence, without shewing it was lost. *Bliedstyn versus Sedgwick.* T. 9 G. II. 304
6. Although it be not particularly laid in the declaration, the expence of salvage may be given in evidence in an action on the policy. *Cary versus King.* T. 9 G. II. *ib.*
7. The plaintiff may give in evidence any loss immediately proceeding from the cause alleged. *Id.* *ib.*
8. In a suit on a contract of marriage, sentence of a spiritual court on a question whereof it had proper jurisdiction, may be given in evidence under the general issue; and, where given to the principal point, held conclusive. *Mendez and Villa Real.* H. 7 G. II. 18
9. The sentence of an ecclesiastical court in matrimonial causes is evidence against third persons. See *Mendez v. Villa Real*, 18, *post.* *Clues and Bathurst.* H. 7 G. II. 11
10. In prohibition the defendant is considered as an actor suing for a consultation, and therefore a custom stated in the declaration need not

## EVIDENCE, (continued.)

not be strictly proved as laid.  
*Sharp versus Lowther.* T. 9 G. II.

Page 292

11. The record of a conviction in a criminal matter, cannot be read as evidence in a civil suit. *Gibson versus M'Carty.* T. 9 G. II. 311

12. The duplicate of the justice's discharge, not evidence of any fact which is the foundation of their jurisdiction. *Savage and Haddon versus Field.* M. 9 G. II. 186

13. The testimony of the steward of the sheriff's court, inadmissible to prove that plaintiffs had been levied without producing them. *Wilkinson v. Saller and Perry, Sheriffs of London.* T. 9 G. II. 310

14. The testimony of the wife alone cannot, in order to bastardize her child, be received, as evidence of the non-access of her husband; but after non-access is otherwise proved, her testimony will, *ex necessitate*, be evidence as to the putative father. *The King and Reading.* M. 8 G. II. 79

15. Where in an action of debt upon bond against the executors of B, one of the obligors, C being the other, the defendants plead that B in his life-time and C paid off the bond, and the evidence in support of the plea is, that B paid only a small part in his life-time, and that C, the other obligor, after B's death, paid the remainder, held, that the evidence does not support the plea. The defendants might have pleaded the facts as proved; or, that C paid the whole. *Hudson Ex. of Grover v. Stalwood and Al' Exs. of Stalwood.* T. 8 G. II. 133

See ACTION ON THE CASE, No. 3. BANKRUPT, No. 2. BILL OF EXCHANGE, No. 1, 2. CUSTOM. PROHIBITION, No. 4. WITNESS, No. 1, 2, 3, 4, 6, 7, 10, 11, 12.

## EXCOMMUNICATION.

See PROHIBITION, No. 9.

## EXECUTION.

Where a bond is given conditioned to pay at a future day, and a warrant of attorney to enter up judgment thereon, but judgment is signed and execution issued before that day, the judgment will be held regular; but the condition operating a *cesset executio*, the execution will be set aside. *Anonymous.* T. 9 G. II. Page 270

See COMMITTITUR PIECE. ERROR, No. 5. PRACTICE, No. 23, 24, 25.

## EXECUTOR.

1. An executor or administrator may renounce without exhibiting any inventory. *Lord Suffolk's case.* M. 7 G. II. 9

2. Where an executor declares in trover on the possession of his testator, and a conversion after his death, and is nonsuit, the executor must pay costs. *Harris and Us' versus Hanna.* H. 9 G. II. 204

3. A defendant, an executor, disabled by palsy from speaking, and also from writing his name, was, upon an undertaking that in the meantime he should prefer no creditor to the plaintiff's prejudice, allowed time to plead; and, the disability continuing such time, upon the defendant's consenting to a rule to try the following term, was further enlarged. *Jasper and Grosvenor, Executor of Peake.* T. 7 G. II. 51

See ABATEMENT, No. 1. ASSETS. ERROR, No. 5. 9. PLEADING, No. 21, 22.

## EXECUTORY DEVISE.

Where money in the orphan's fund and bank stock was limited by the testator in trust for such of his brother's children then unborn as should attain their age of twenty-one,  
F f

one, it was adjudged a good executory devise. *Sabbarton versus Sabbarton*. 11 E. G. II. Page 413

### EXTENT.

See *FIERI FACIAS*.

## F.

### FALSE IMPRISONMENT.

See *PLEADING*, No. 14.

### FELONY.

1. Taking in the presence of, is a felonious taking from the person; and where the property was taken in the presence of, although not from the person, such presence must be found in the special verdict: but the words, "then and there immediately took," is not a sufficient finding to make it robbery. *The King versus Francis & Al.* E. 8 G. II. 113
2. Appearing in the high road with the face blacked, or being disguised, is an offence within the 9 Geo. I. c. 22; for the several facts there enumerated are not to be taken as being parts of the same offence, but each of them a several offence. *The King versus Baylis and Reynolds*. T. 9 G. II. 291

### FICTITIOUS ACTION.

See *CONTEMPT*, No. 3.

### FIERI FACIAS.

The distinction between an extent and a *fieri facias* is, that on the *fi. fa.* the sheriff cannot deliver the goods, but must levy, i. e. sell them. On an extent they may be delivered. *Moore and Anderson*. E. 8 G. II. 103

See *SHERIFF*.

### FINE.

A "reasonable" fine may mean a certain one. *Moore versus The Mayor of Hastings*. H. 10 G. II. Page 362

### FORCIBLE ENTRY.

The court has a discretionary power to award restitution immediately upon a removal of an indictment for a forcible entry by *certiorari* before plea, and therefore will put the defendant under terms to plead or demur in two days; and if he plead, to take short notice of trial. *The King v. Marrow*. M. 9 G. II. 174

### FORMA PAUPERIS.

1. On an indictment the party may be admitted to defend in *formâ pauperis*. *The King v. Wright and his Wife*. H. 9 G. II. 211
2. On an indictment the party may be admitted to defend in *formâ pauperis*. *Ibid.* E. 9 G. II. 253
3. Although a plaintiff upon an issue directed out of Chancery, shall appear to have been regularly admitted to sue in *formâ pauperis* there, he must also be regularly admitted to enable him to try such issue. And such admission may be made during the trial. *Gibson versus M'Carty*. T. 9 G. II. 311

### FRANCHISE.

The mode of obtaining an information for the usurpation of a private franchise is by application to the Attorney-general for that purpose. *Ibbotson's case*. E. 9 G. II. 261  
See *QUO WARRANTO*, No. 4.

### FREIGHT.

See *SHIPPING*, No. 1.

### GENTLEMAN

## G.

## GENTLEMAN PENSIONER.

See JURY, No. 1.

## H.

## HEIR.

See DEVISE, No. 1.

## HEIRS MALE.

See DEVISE, No. 7.

## HIGHWAY—Description.

See INDICTMENT, No. 5, 6.

## HIRING.

See SETTLEMENT, No. 9.

## HUE AND CRY.

See PLEADING, No. 8. *VENIRE FACIAS*.

## HUSBAND AND WIFE.

1. Articles of the peace exhibited by the wife against the husband. *The King and Brotherton*. M. 8 G. II. Page 74
2. The husband alone, sued for a malicious prosecution of himself and his wife; verdict for the defendant, as to the prosecution against the husband; and for the plaintiff as to the prosecution of his wife; notice in arrest of judgment, upon the ground that the wife ought to have joined in the action; denied. *Smith and Hickson*. T. 7 G. II. 55
3. Where husband and wife are convicted of a misdemeanor, and previously to judgment the husband absconds, the giving judgment against the wife shall not, on that account, be delayed. *The King*

HUSBAND AND WIFE,  
(continued.)

versus *Thomas and his Wife*. T. 9 G. II. Page 278

See EVIDENCE, No. 14. INFORMATION, No. 4. PARTIES TO ACTION. PRACTICE, No. 15. WITNESS, No. 2. 8.

## I. &amp; J.

## IMMATERIAL ISSUE.

See PLEADING, No. 27.

## INDEBITATUS ASSUMPSIT.

See ASSUMPSIT.

## INDICTMENT.

1. One joint tenant may indict the other for a forcible entry. *The King v. Marrow*. M. 9 G. II. 174
2. In an indictment charging the offence in the disjunctive, is bad. *The King v. Flint*. E. 10 G. II. 370
3. Counts in an indictment cannot be struck out. *The King v. Peterus*. H. 9 G. II. 203
4. If on argument on an indictment for a capital crime, a prisoner appear to have committed a less offence, the court will remand him for the purpose of being tried on a new indictment. *The King v. Francis & Al.* E. 8 G. II. 113
5. Where it did not appear that any part of the road was in the parish indicted for not repairing it, the indictment was held bad.  
So likewise if the breadth does not appear. *Tamen quare*. *The King v. The Inhabitants of All Saints and St. Mary's*. E. 8 G. II. 105
6. In an indictment for not repairing a highway,  
F f 2

**INDICTMENT, (continued.)**

a highway, it need not be described as a highway to be used in any particular manner. *The King and The Inhabitants of Hatfield*. M. 10 G. II. Page 315

7. In an indictment for removing a pauper, it must be alledged, that he was likely to be chargeable, and to the damage of the parish. *The King v. Flint*. E. 10 G. II. 370

See FELONY, No. 1. FORCIBLE ENTRY. FORMA PAUPERIS, No. 1, 2. WITNESS, No. 1.

**INFANT.**

1. A judgment entered up under a warrant of attorney executed by an infant, set aside on motion; but as to a bond given at the same time with the warrant of attorney, the court left the party to his defence on a trial. *Wilmot v. Bye*. T. 10 & 11 G. II. 376
2. Although an infant agree not to bring a writ of error, it binds him not; but he may assign his infancy for error. *Stern and Bern*. E. 8 G. II. 104

See CORPORATION, No. 1. COSTS, No. 2. WARRANT OF ATTORNEY, No. 1.

**INFORMAL ISSUE.**

See PLEADING, No. 27.

**INFORMATION.**

1. The oath of the informer is insufficient to ground an information on a penal statute requiring "proof to be made on oath." *The v. Moore*. M. 9 G. II. 176
2. The day when it was exhibited must appear upon an information upon stat. 5 Eliz. c. 4. s. 31, otherwise it is bad, and the proceedings will be stayed. *The King v. Holmes*. E. 10 G. II. 364
3. After rule to shew cause why an

**INFORMATION, (continued.)**

information for not repairing a road is granted, but with a view to afford time for repair, retained, the road must be substantially, not partially mended, otherwise the rule will be made absolute. *The King v. The Inhabitants of Chedinfold*. M. 9 G. II. Page 159

4. Service of a rule nisi for an information for a libel upon the defendant's wife, he, at the time of service being in France, held bad. *The King v. Baldwyn*. T. 9 G. II. 271

5. If upon an application by a mayor for a criminal information against a person for striking him while in the execution of his office, it appear that the mayor struck first, it will be refused. *The King v. Symonds*. E. 9 G. II. 240

6. Generally, the court will not grant an information where there is a civil suit depending relative to the same matter. *The King v. Phillips and Others*. E. 9 G. II. 241

7. On a motion that unnecessary counts in an information be struck out, the court recommended an application to the Attorney-General for a summons to the prosecutor's attorney, to shew cause why they should not be struck out. *The King v. Green*. H. 9 G. II. 209
- See AMENDMENT, No. 3. CONTEMPT, No. 2. COSTS, No. 5. JUSTICES OF THE PEACE, No. 1, 2. QUO WARRANTO.

**INFORMER.**

See INFORMATION, No. 1.

**INQUIRY,**

*Writ of Inquiry.*

See AMENDMENT, No. 7. MANDAMUS, No. 6.

**INSOLVENT**

**INSOLVENT DEBTOR.**

See EVIDENCE, No. 4.

**INSPECTION OF BOOKS.**

See BOOKS—INSPECTION OF BOOKS.

**INTERLOCUTORY JUDGMENT.**

See PRACTICE, No. 18. 26.

**JOINT TENANTS.**

See INDICTMENT, No. 1.

**IRREGULARITY.**

*Waiver of Irregularity.*

See PRACTICE, No. 2. 12. 27. 28.

**JUDGE.**

See JURISDICTION, No. 3.

**JUDGES OF AN INFERIOR COURT.**

See CONTEMPT, No. 2.

**JUDGE'S CERTIFICATE.**

See TRIAL—NEW TRIAL, No. 1.

**JUDGE'S WARRANT.**

See ATTACHMENT, No. 1.

**JUDGMENT.**

If the matter appearing by a special verdict be sufficient upon the whole to found a judgment, the court may so mould such matter as to give a proper judgment, resulting from the whole taken together: therefore where assets in gross were found by a special verdict, the court may sever the gross sum so found by the jury as assets, and attach a lien thereon for the penalties of one set, and for the sums mentioned in the conditions of the other set of out-

**JUDGMENT, (continued.)**

standing bonds. *The Bank of England v. Catherine Morrice, Widow, Executrix of Humphrey Morrice, deceased.* H. 9 G. II. Page 219

See ACTION OF ACCOUNT. ARREST. AMENDMENT, No. 4. DOWER.

**JURISDICTION.**

1. Debt lies in an inferior court upon a judgment in the superior courts. *Moore and Anderson.* E. 8 G. II. 103
2. The sessions have an original jurisdiction in respect of discharging an apprentice. *Arglis and Heaseman.* E. 8 G. II. 101
3. Although a court have original jurisdiction of a cause, yet if it award process, which it hath no jurisdiction to award, an action for false imprisonment lies against the judge and officers. *Smith v. Boucher & Al.* M. 8 G. II. 69
4. But if the judge have a jurisdiction to do an act, and he do it mistakenly, no action will lie. *Id.* *ib.*

See EVIDENCE, No. 8. 12. PROHIBITION.

**JUROR.**

See TRIAL—NEW TRIAL, No. 3.

**JURY.**

1. A gentleman pensioner, being an officer on the cheque roll, is exempt from serving on juries. *Blagney's case.* H. 9 G. II. 202
2. The jury will be discharged where on cause being called on neither party appears. *Smith v. Whistler.* T. 9 G. II. 305
3. It is with the jury to find whether the money brought into court be sufficient



**JURY, (continued.)**

sufficient or insufficient to cover the plaintiff's demand. *Comyns v. Allen*. E. 9 G. II. Page 260

**JURY (SPECIAL).**

See PRACTICE, No. 17.

**JUSTICES OF THE PEACE.**

1. A justice of the peace is not bound to hear witnesses on behalf of the party accused, unless he, being summoned, shall attend in person. *The King v. Neal*. E. 8 G. II. 112
2. The committing a pauper to the house of correction without any previous summons, or any oath made of his return, after removal, is contrary to natural justice; and is, therefore, a ground for an information against the justices. *The King v. Angell*. T. 8 G. II. 124

**JUSTICES OF THE PEACE—  
ORDER OF JUSTICES OF  
THE PEACE.**

1. Although in a question of bastardy the wife cannot be examined as to the non-access of the husband, yet if an order of two justices adjudge upon her examination, and other proof upon oath, such order is good. *The King and The Inhabitants of Bedel*. T. 10 & 11 G. II. 379
2. In an order of justices, it is sufficient that the county appear in the margin. *Between the Parishes of Spalding and Bourn*. E. 8 G. II. 122
3. It is not sufficient to alledge on an order for removal that the pauper is likely to become chargeable, without saying to "that parish." *Id.* *ib.*
4. The authority given to justices out of sessions, in cases of bastardy, is by stat. 18 Eliz. c. 3; and which

**JUSTICES OF THE PEACE—  
ORDER OF JUSTICES OF  
THE PEACE, (continued.)**

confers no power to convict or acquit: therefore, an order made by such justices to acquit or discharge the person charged with being the putative father of a bastard child is bad. *The King v. Jenkin*. T. 9 G. II. Page 301  
See CONVICTION. MANDAMUS, No. 5. SESSIONS—ORDER OF SESSIONS, No. 2.

**JUSTIFICATION.**

See PLEADING, No. 14.

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**L.****LANDLORD AND TENANT.**

1. Demise for a year, and so from year to year, is a lease for every particular year, and good for every year that lessee enters into. *Combes v. Cole*. T. 9 G. II. 305
2. When the landlord gives notice to the sheriff in possession under a *fi. fa.* that a year's rent is due, and then afterwards removes the goods and sell them, he may on a summary application to the court, grounded on an affidavit of the facts, be ruled to pay over such rent to the landlord. *Darling and Hill*. E. 9 G. II. 255  
See ASSUMPSIT. COVENANT. DISTRESS, No. 1, 2. PLEADING, No. 14.

**LEASE.**

See LANDLORD AND TENANT, No. 1.

**LEGACY.**

See PROHIBITION, No. 5.

**LIMITATION.**

See DEVISE, No. 3.

**LIMITATIONS IN ERROR.**

See ERROR, No. 5.

LONDON.

## LONDON.

Bye-law that no drayman or brewer's servant shall be in any of the streets of London after certain hours, good. *Bosworth v. Herne*. H. 11 G. II. Page 405

See ACTION ON THE CASE, No. 2. BOOKS—INSPECTION OF BOOKS, No. 2. CORPORATION, No. 5. ORPHANAGE. SHERIFFS OF LONDON.

## M.

## MANDAMUS.

1. A *mandamus* lies to the ecclesiastical officer to swear in a churchwarden. *The King v. Dr. Henchman*. T. 8 G. II. 130
2. Application grounded on stat. 11 Geo. I. c. 4, for a *mandamus* to proceed to an election of a mayor. *The King and The Corporation of Oxford*. M. 9 G. II. 178
3. Two writs of *mandamus* granted for the same election. *Id.* *ib.*
4. *Mandamus* lies against an officer on stat. 11 Geo. I. c. 18, notwithstanding a penalty be given thereby. *The King v. Everet*. E. 9 G. II. 261
5. *Mandamus* lies to the only resident justice of the *quorum* to sign a poor's rate. *The King and The Mayor of Worcester*. T. 8 G. II. 128
6. Where a jury trying traverses under stat. 9 Ann. c. 30, omits to find damages, the court will not direct a writ of inquiry for the purpose of assessing them. *Kinaston v. The Mayor, Aldermen and Assistants of Shrewsbury*. T. 9 G. II. 295
7. Where it is suggested on the face of a writ of *mandamus* directed to an inferior officer of a college, that such college is subject to the power of a visitor, the writ is *jelo de se*, and will be quashed; for where there is a visitor, the court

## MANDAMUS, (continued.)

- has no power. And it is the same whether the king or a private individual be the visitor. *Dr. Walker's case*. H. 9 G. II. Page 212
8. Where it appears that the right to exercise a private office is already the subject of a suit in equity between the parties, the court will not interfere by *mandamus*. *The King and Wheeler*. E. 8 G. II. 99
  9. The court will not, on motion for a *mandamus*, determine a corporation question of consequence, but will direct the writ to issue that the question may be decided on the return. *The King v. Everet*. E. 9 G. II. 261
  10. When no one in particular is interested to bring an action for a false return to a *mandamus*, and the affidavits are contradictory, the court will direct an information to try the facts between the parties. *The King v. The Overseers of the Poor of the Town of Spotland*. M. 9 G. II. 184
  11. On motion for a *mandamus* to restore one to an office, no affidavit that he once enjoyed it, is necessary; as that fact may be stated in the return. *The King and The Company of Cutlers*. T. 8 G. II. 129
- See CORPORATION, No. 2. 3. 5. 8. COSTS, No. 6. CUSTOM. EXECUTOR, No. 1. VESTRY MEETING.

## MARGIN.

*County in the Margin.*

See JUSTICES OF THE PEACE—ORDER OF JUSTICES OF THE PEACE, No. 2.

## MARKET OVERT.

See ACTION ON THE CASE. TROVER, No. 5.

## MARRIAGE.

See EVIDENCE, No. 8. PROHIBITION, No. 8. WITNESS, No. 2.

## MARRIAGE

## MARRIAGE SETTLEMENT.

See ORPHANAGE.

## MEMBER OF PARLIAMENT.

See PRIVILEGE, No. 1, 2, 3.

## MISDEMEANOR.

The knowingly *having* iron stamps which would make the similitude of a figure impress upon the current gold coin, is indictable as a misdemeanor. *The King v. Sutton.* E. 10 G. II. Page 370

## MISNOMER.

See ABATEMENT, No. 2.

## MODUS.

See PROHIBITION, No. 3, 4.

## MOLLITER MANUS IMPOSUIT.

See PLEADING, No. 16, 17.

## MONEY,

*Brought into Court.*

1. After verdict in his favour, the defendant cannot be paid back money brought into court by him on a plea of tender, but it belongs to the plaintiff. *Cox and Robinson.* H. 9 G. II. 206
2. As to whether a sum paid into court be about or under the sum due, is referable to the jury upon the verdict of the different witnesses. *Comyns and Allen.* E. 9 G. II. 260

*Leave to bring Money into Court.*

See PRACTICE, No. 13.

## MOTHER,

See WITNESS, No. 2,

## N.

## NIL DEBET.

Pleading *nil debet* in assumpsit is an issuable plea within a judge's order for time to plead, and therefore plaintiff cannot have leave to sign interlocutory judgment. *Baily v. Edwards.* M. 9 G. II. Page 179

See PRACTICE, No. 15.

## NOCTANTER,

*Writ of Noctanter.*

See COSTS, No. 7.

## NON-ACCESS,

See JUSTICES OF THE PEACE, No. 1.

## NON-JOINDER OF PARTIES.

See ABATEMENT, No. 3.

## NOT GUILTY.

See PLEADING, No. 13. VERDICT, No. 2.

## O.

## ORDER OF SESSIONS.

See SESSIONS—ORDER OF SESSIONS.

## ORPHANAGE,

*Release of Orphanage by intended Husband.*

The intended husband of a woman, an infant, and whom he afterwards married, may release her orphanage share of her father's personal estate; such release is an extinguishment of the wife's right to the orphanage part, and leaves the estate of the father as if it had never been charged in respect of orphanage: consequently such orphanage

**ORPHANAGE, (continued.)**

phanage cannot be considered as the dead man's part, and go wholly to the father's executor, but must be considered as a part of his personal estate, and be distributable accordingly. *Metcalf v. Ives and Johnson. In Chancery.* T. 10 & 11 G. II. Page 382

**OVERSEERS OF THE POOR.**

See DAMAGES, No. 2.

**OUTLAWRY.**

1. Plaintiff not compellable to reverse an outlawry at his own expence, except on account of misbehaviour; where there is mistake or error in law, reversal must be by writ of error. *Lloyd and Williams.* E. 8 G. II. 123
2. Although it may be doubtful [*quære?*] whether an action in debt by original will lie in K. B. yet an outlawry commenced and prosecuted in debt in that court, will not be set aside for irregularity. *Bounds v. Allen.* M. 10 G. II. 317

**OWNER OF A SHIP.**

See SHIPPING.

**OXFORD UNIVERSITY.**

See CONUSANCE.

**OYER.**

See PRACTICE, No. 5.

**P.****PAPER BOOK.**

See AMENDMENT, No. 5.

**PAPIST.**

See DEVISE, No. 4, 5, 6.

**PARTIES TO ACTION.**

Where it does not appear that the taking was during the coverture, declaration by husband and wife in replevin for taking the goods of the husband and wife held good; for as they might have been jointly possessed before marriage, so after, they might declare as for the goods of husband and wife. *Bern & Uz. and Mattaire.* E. 8 G. II. Page 119

See ABATEMENT, No. 3.

**PAUPER.**

See JUSTICES OF THE PEACE, No. 2.

**3. SETTLEMENT.****PERFORMANCE.**

See PLEADING, No. 16. 18.

**PERJURY.**

See WITNESS, No. 7.

**PETITIONING CREDITOR'S DEBT.**

See BANKRUPTCY, No. 3. EVIDENCE, No. 3.

**PLAINTS,**

*Evidence that Plaints had been levied.*

See EVIDENCE, No. 13.

**PLEADING.**

1. In an action of debt upon charter-party the breach assigned was, that defendant had not paid to plaintiff for the freight, £200, with average according to the charter-party, but without stating any amount as to average, held certain enough. *Dodd v. Atkinson.* M. 10 G. II. 342
2. Averment of notice of a fact of which defendant must be conusant, unnecessary; and although it might be necessary the defect is aided by pleading

PLEADING, (*continued.*)

- pleading over. *Dodd v. Atkinson*. M. 10 G. II. Page 342
3. Where it is stated, that the defendant *covenanted*, it must be inferred that it was by deed, and although the instrument declared upon were not sufficiently shewn to be a deed, yet the defect is aided by pleading over. *Id.* *ib.*
4. In order to charge the indorser of a promissory note, it is not necessary to aver notice of non-payment by maker. [*Tanen quare?*] *Hamilton v. Muckrell*. M. 10 G. II. 322
5. Where the plaintiff declares in trespass against the defendant for taking certain soil, but does not alledge property therein, *Quare*, whether, if alledged in the original writ, the defect be aided on verdict? *Franklyn and Reeves*. E. 8 G. II. 118
6. Averments of the falsity of the charge not necessary, the gist of the action being, whether the words were spoken falsely and maliciously. *Carpenter v. Tarrant*. M. 10 G. II. 339
7. No averment of performance of covenants on the part of the plaintiff necessary. *Jodderell v. Cowell*. M. 10 G. II. 343
8. Declaration upon the statute of *Winton* rightly concludes, "contrary to the form of the statute," &c. and this, although there be several statutes upon the same subject. "Before S. C. secondary," &c. "to J. H. high constable," &c. "before J. S. justice," &c. are sufficient without stating them to be then secondary, high constable, &c. Averment that there was but one high constable unnecessary. *Merrick v. The Hundred of Ossulston*. H. 11 G. II. 409
9. Demurrer to a declaration on a promissory note, wherein it was said the defendant was "summon-

PLEADING, (*continued.*)

- "ed," instead of "attached," to answer, over-ruled. *Busby and Eliston*. H. 9 G. II. Page 189
10. A release by will cannot be pleaded to a bond debt. *Quare*, Why? *Parsons v. Coward*. H. 10 G. II. 357
11. A defendant cannot plead both in bar and in abatement at the same time, to the same matter. *Holt and Mabblerley*. T. 8 G. II. 135
12. A recovery of damages in an action *sur prohibition*, is no answer to an action on the stat. 2 Hen. IV. c. 11, for double damages and £10 for suing plaintiff in the Admiralty court. *Smith q. t. v. Gibson*. M. 10 G. II. 317
13. Not guilty in *assumpsit* bad on demurrer, although cured by verdict. *Marshall and Gibbs*. M. 9 G. II. 173
14. Where the lessee in an action of covenant for rent pleaded, that with the consent of the lessor, he assigned the premises to another, who entered and paid him the rent, it was held bad on demurrer. *Jodderell v. Cowell*. M. 10 G. II. 343
15. In pleading eviction by a person other than the plaintiff, the defendant must shew that the evictor had title to enter; whose title ought to have been set out: and the defendant should also shew under what process the evictor entered. *Jordan and Twells*. M. 9 G. II. 171
16. One cannot justify a battery by barely shewing an arrest. *Williams and Jones and Others*. T. 9 G. II. 298
17. To an action for an assault and battery, *molliter manus imposuit* may be pleaded to the battery. *Tottage v. Petty*. H. 10 G. II. 353
18. In pleading conditions performed, the rule is, that where there is a negative and affirmative, the having performed the negative must not

PLEADING, (*continued.*)

not only be shewn, but likewise the affirmative; therefore, in an action of debt upon bond, conditioned that a receiver should duly account, and should in all respects behave himself as a receiver ought; and the defendant pleads, that he never received but one penny, which he had paid to the obligee; but did not alledge that he did in all respects behave himself, &c. such plea is bad upon general demurrer. *Fletcher v. Richardson.* M. 10 G. II. Page 322

19. Where in a justification of imprisonment under process of the vice court of the chancellor of Oxford, the defendants set out a custom for the plaintiff in that court to make oath, that he has a personal action against the defendant, and that the plaintiff believes the defendant *will run away*, upon which oath being made the judge may grant a warrant, such custom was held not supported by an affidavit stating that the plaintiff *suspects* the defendant will run away. If a plea be ill as to one, it is ill as to all. *Smith and Boucher and Others.* T. 7 G. II. 69
20. The court of K. B. allowed a party to plead several statutes, although it appeared that they voided only certain claims made prior to the time the demand specified in the declaration arose. *Ward and The Charitable Corporation.* T. 8 G. II. 126
21. An executor allowed to plead double, viz. payment and *plene administravit.* *Anon.* M. 9 G. II. 178
22. Motion that an executor be at liberty to plead double, granted. *Hughes and Pigot.* E. 9 G. II. 243
23. In *sci' fa'* against a terre-tenant, the defendant may plead double. *Ellis and Mortimer.* T. 8 G. II. 152

PLEADING, (*continued.*)

24. In a *qui tam* upon stat. 19 Ann. c. 14, the defendant cannot plead double. *Morgan q. t. v. Luckup.* E. 9 G. II. Page 262
  25. Duplicity in pleading can only be taken advantage of by special demurrer. *Browning v. Dann and Others.* M. 9 G. II. 167
  26. Where by one part of a replication matter that goes to the whole action is put in issue, and then the replication goes on to reply *de injuria*, it is bad for duplicity, and not for being immaterial or departure; and it is ground of special demurrer. *Humphreys v. Churchman.* T. 9 G. II. 289
  27. Where in an action against three, one pleads that himself and another is not guilty, upon which issue is joined, and verdict for the plaintiff, held that this is an informal not an immaterial issue; *aliter*, semble, had the verdict been for the defendant. *Hill v. Fleming and Others.* M. 10 G. II. 341
  28. Where to an action upon a promissory note it was pleaded that it was corruptly agreed, &c. the plaintiff may reply that the security was given for a just debt, and traverse that it was agreed *modo et forma* as the defendant pleads. *Cock and Ratcliffe.* T. 9 G. II. 287
  29. Where the plea alleges a certain act to have been a consequence of another act, and the replication traverses it as being previous to that act, the replication not being *ad idem*, is bad on demurrer. *Humphreys v. Churchman.* T. 9 G. II. 289
- See ABATEMENT, No. 3. AMENDMENT, No. 5. 8. ASSETS. DISTRESS, No. 2. INFORMATION. No. 7. MODUS. PRACTICE, No. 9. 15. PROHIBITION, No. 4. SCIRE FACIAS, No. 2.

## PLEDGES

## PLEDGES TO PROSECUTE.

See DECLARATION, No. 2.

## POLICY OF ASSURANCE.

See EVIDENCE, No. 6.

## POOR.

See DAMAGES, No. 2. JUSTICES OF THE PEACE—ORDER OF JUSTICES OF THE PEACE, No. 2. MANDAMUS, No. 5. PAUPER SETTLEMENT.

## PRACTICE.

1. Service of process is bad where a sight of the original being demanded is not granted. *Edgar and Farmer*. T. 8 G. II. Page 130. 138
2. No advantage can be taken of irregularity in the service of the process after interlocutory judgment. *Id.* *ib.*
3. Common bail must be filed of the term the writ is returnable. *Id.* *ib.*
4. Appearance cures the defect of process, even in an appeal. *Caswall v. Martin*. E. 10 G. 2. 369.
5. Taking a declaration out of the office amounts to an appearance. *Id.* *ib.*
6. Where the plaintiff files bail, according to the statute, the defendant cannot be declared against by-the-bye, as where bail is filed by the defendant. *Wallis and Smith*. H. 9 G. II. 207
7. In an action upon the bail bond, where the defendant consents to put the plaintiff in as good a situation as if a trial had been had, the proceedings will be stayed. *Tatlock v. Swan*. E. 10 G. II. 364
8. Where the same policy of insurance is repeated in a second count, rule for oyer of two policies denied. *Boissier v. The London Assurance Company*. E. 9 G. II. 243

## PRACTICE, (continued.)

9. The court will not at the instance of the plaintiff strike out a count in a declaration after time to plead. *Wilkins v. Perry and Salter, Sheriffs of London*. T. 8 G. II. Page 129
10. Where several actions of trespass are brought against several defendants for the *mesne* profit of lands recovered by the same ejectment, the court will not direct them to be consolidated. *Alley*, where several are brought for one and the same cause against the same defendant. *Stacey and Sutton*. T. 8 G. II. 137
11. Where neither the plaintiff in error or his attorney can be found, motion that fixing up the rate to assign error in the office. *K. B.* may be sufficient, granted. *Tompson and Baker*. T. 8 G. II. 130
12. Leaving notice under the party's door, in no case sufficient; yet if the plaintiff [his attorney?] make inquiry after the bail, and declare himself satisfied with them, he waives the want of notice. *Rice and Kelly*. E. 7 G. II. 28
13. In debt for rent the money cannot be brought into court. *Lee and Irish*. M. 9 G. II. 173
14. In an action against baron and feme, the feme cannot have leave to plead separately from her husband. *Gordon v. Halpen and his Wife*. E. 8 G. II. 101
15. *Nil debet* pleaded in an action upon a promissory note, although ill upon demurrer, is an issuable plea within the meaning of a judge's order for time to plead, and upon which the plaintiff cannot have leave to sign judgment. *Baily and Edwards*. M. 9 G. II. 179
16. *Nil debet* allowed to be withdrawn, and *non assumpsit* pleaded. *Nichols and Sutcliff*. T. 7 G. II. 56
17. Mode of striking a special jury in the absence of one party. *The King v. Duffin*. M. 9 G. II. 158
18. Where

## PRACTICE, (continued.)

18. Where the judgment by default is regularly signed, the court will not set it aside on the ground of a release of the debt before action brought. *Lockwood and Beaumont*. M. 9 G. II. Page 157
19. Rule for a view granted on affidavit as to its utility. *Ellis v. Squit and Others*. T. 8 G. II. 156
20. A countermand of notice of trial given to the agent in town, must be four days before the assizes. *Metcalpe v. Humphreys*. E. 10 G. II. 369
21. Notice of an intention to move on the day of trial, to put off a trial must be previously given to the opposite party, together with copies of the affidavits on which the motion is intended to be grounded. *Edwards v. Vesey*. T. 8 G. II. 128
22. Where the plaintiff moves to put off the trial until the production of a deed, it must be sworn, that the party cannot safely go to trial without it. *Ants*. 10 & 11 G. II. 390
23. Execution issued within the time specified by a *cesset executio* set aside. *Francis and Nash*. T. 7 G. II. 53
24. But where long collateral agreements are stated as a ground for staying execution, the court will not interfere, but leave the party to his remedy in Chancery. *Id.* *ib.*
25. Nothing that cannot be sold can be taken in execution; as deeds, writings, &c. Bank notes cannot be taken in execution. *Id.* *ib.*
26. Where it appears that the signing interlocutory judgment was after the defendant's death, the same, and the *scire facias thereon* will be set aside. *Sibbet v. Russell*. M. 9 G. II. 183
27. After notice of the declaration, it is too late to take advantage of

## PRACTICE, (continued.)

- an irregularity in the service of the process. *Matthews and Lucas*. E. 9 G. II. Page 240
28. Taking a declaration out of the office, is a waiver of irregularity on the ground of no notice being subscribed to the copy of the process served. *Morgan and Luckup*. E. 9 G. II. 242
29. Upon motion to stay proceedings in debt upon bond, upon payment of principal, interest and costs, costs in equity must be included. *Lock and Shermer*. E. 8 G. II. 116
30. Proceedings in an action of debt upon bond stayed, upon payment of principal, interest and costs. *Buckler and Ash*. T. 8 G. II. 124
31. Where the defendant swears that he neither knows, nor is indebted to plaintiff, and that his attorney cannot be found, proceedings will be stayed; and sticking up the rule in the office will be deemed good service. *Evans and Jones*. M. 9 G. II. 179
32. Proceedings in an action of debt on bond will not be stayed, although it was agreed that the bond should not be made use of till upon the happening of certain contingencies. *Dolliffe and Langley*. E. 9 G. II. 240
33. The plaintiff in a hard action will not after verdict be permitted to discontinue. *Boucher v. Lawson*. H. 8 G. II. 85

See AFFIDAVIT. AMENDMENT, No. 8. ATTACHMENT, No. 2, 4, 5. ATTORNEY. CONTEMPT, No. 1. DETAINER. FORMA PAUPERIS, No. 3. JUDGMENT. MONEY BROUGHT INTO COURT. PLEADING, No. 20, 21, 22, 23, 24. TRIAL—NEW TRIAL. VENUE. WITNESS, No. 5.



## PRACTICE IN CROWN LAW.

Previously to calling a defendant and his bail upon their recognizance, notice is necessary. *The King v. Adams*. E. 9 G. II.

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See CERTIORARI. FORMA PAUPERIS, No. 1. 2.

## PRISONER.

Where the defendant a prisoner shall have been superseded for want of proceeding to judgment in due time, but remains in custody at the suit of another person, the plaintiff in the action in which he had been superseded may charge him in execution. *Mitchell v. Pate*. T. 9 G. II. 287

See ARREST. COMMITTITUR PIECE. DETAINER, No. 1, 2.

## PRIVILEGE.

1. As to granting a writ of privilege out of Chancery for the discharge of a member of parliament, arrested *redeundo*, *quare*. A member of parliament arrested *redeundo* may be discharged on motion without filing common bail. *Holiday and Pitt, &c.* T. 7 G. II. 37
2. Members of parliament, after its dissolution have privilege *redeundo*. *Holiday and Pitt*. E. 7 G. II. 28
3. If arrested, a member may be discharged on motion without filing common bail. *Id.* *ib.*
4. An attorney, although steward to a peer, has no privilege of parliament. *Wickham v. Hobart*. M. 10 G. II. 348
5. Upon an application under stat. 7 Ann. c. 12, to be discharged from custody, the defendant being a domestic servant of an ambassador, the affidavit must specify the service. *Holmes and Gordon*. M. 7 G. II. 3

See JURY, No. 1.

## PROCESS.

See PRACTICE, No. 1, 2. 4. 28.

## PROHIBITION.

1. Although whenever the want of jurisdiction appears upon the face of the proceedings below, prohibition after sentence may issue without affidavit, yet where such want appears upon suggestion only, after sentence, an affidavit verifying it is necessary. *Selby and York*. T. 10 & 11 G. II. Page 392
2. Before sentence in Ecclesiastical or Admiralty courts, a prohibition may be granted upon a suggestion of a matter of fact not appearing on the face of the proceedings below; but after sentence it will not be granted upon the bare averment of a fact: yet the want of jurisdiction appearing upon the face of the libel, or of any part of their proceedings, is a sufficient ground for a prohibition after sentence. *Smith v. Langley*. M. 10 G. II. 317
3. Where the Ecclesiastical court entertains a question as to a *modus*, prohibition lies. *Hood and Helden*. II. 9 G. II. 203
4. Where in prohibition a *modus* is sufficiently found, the having stated it in the declaration as a *custom* for all tenants of a certain tenement, to pay it instead of tithes, will be sufficient, and no consultation can go. *Sharp v. Lowther*. T. 9 G. II. 292
5. Prohibition for suing the administrator of an executor for a legacy given by his testator [granted]. *Tucker and Towell*. M. 9 G. II. 185
6. Prohibition granted, after sentence to compel present churchwardens to make a rate to reimburse the late churchwardens.  
No affidavit necessary. *Dawson and Wilkinson*. T. 10 & 11 G. II. 381
7. Prohibition

PROHIBITION, (*continued.*)

7. Prohibition by husband and wife not abated at common law by the death of the husband; and if it were, the action surviving, it was aided by stat. 8 & 9 *Will.* III. c. 11. *Middleton and Croft.* M. 10 & 11 G. II. Page 395
8. The stat. 7 and 8 *Will.* III. hath not, by inflicting a penalty upon a clandestine marriage, taken away the jurisdiction of the spiritual court as to such marriages. *Middleton and his Wife v. Croft.* T. 7 G. II. 57
9. Where the judge of the Ecclesiastical court has proceeded to sentence of excommunication under the stat. 5 & 6 *Edw.* VI. c. 12, a prohibition on the ground of no previous conviction having taken place, was refused. *Bilson v. Chapman and Reynolds.* H. 9 G. II. 190
10. Prohibition to the Spiritual court refused, till the special matter were pleaded there. *Stone v. Harwood.* H. 10 G. II. 357
11. The plaintiff in prohibition, although succeeding only in part, is entitled to costs from the original motion for the prohibition. *Middleton and Croft.* M. 10 & 11 G. II. 395

See EVIDENCE, No. 10.

## PROMISSORY NOTE.

A promissory note payable to the plaintiff, omitting "to his order," held good. *Moore v. Paine.* T. 9 G. II. 288

See EVIDENCE, No. 2.

## PURCHASE,

*Estate by Purchase.*

See DEVISE, No. 3.

## Q.

## QUALIFICATION.

See CORPORATION, No. 1. 3. 5.

## QUANTUM MERUIT.

See ASSUMPSIT.

## QUO WARRANTO.

1. If an election has been made agreeably to long usage, but contrary to the terms of the charter, and it do not appear that any bye-law exists to ground such election, an information *quo warranto* will be granted. *The King v. Tomlyn and Others.* M. 10 G. II. Page 316
2. Plea in *quo warranto* allowed to be amended after demurrer, and cause set down for argument. *The King and Ellames.* T. 7 G. II. 42
3. Where in an information against a defendant for exercising an office of trust, it is laid to be a public office, and the defendant demurs, he cannot afterwards object that it is not an office for which *quo warranto* lies. *The King v. Neal.* E. 8 G. II. 106
4. *B. R.* will not grant an information for private usurpation of a franchise; but the proper remedy is, to apply to the Attorney-general. *Ibbotson's Case.* E. 9 G. II. 261

See BOOKS—INSPECTION OF BOOKS, No. 3. CORPORATION, No. 1. 4. COSTS, No. 8.

## R.

"REASONABLE," (*The Word.*)

See CUSTOM.

## RECOGNIZANCE.

1. A recognizance to appear on a certain day, and in the mean time to keep the peace, discharged on the ground that the day had passed, and that no indictment had been lodged. *The King v. Elizabeth Benn.* E. 8 G. II. 98
2. Recognizance

**RECOGNIZANCE, (continued.)**

2. Recognizance discharged upon producing the prosecutor's consent verified by affidavit. *The King v. England*. M. 8 G. II.

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See PRACTICE IN CROWN LAW.

**REJOINDER.**

See AMENDMENT, No. 5.

**RELEASE,***Release of a Bond Debt by Will.*

See PLEADING, No. 10.

**REMAINDER IN FEE IN TAIL.**

See DOWER, No. I.

**REMITTITUR DAMPNA.**

See ERROR, No. 11.

**REMOVAL OF A PAUPER.**

See INDICTMENT, No. 7. SETTLEMENT, No. 7.

**RENT.**

See ASSUMPSIT. COVENANT. LANDLORD AND TENANT, No. 2.

**REPLEVIN.**

1. Where in a replevin bond the condition was to appear in the county court, and *then and there* prosecute with effect, the removing the cause by *recordari* into the C. P. and being there nonsuited, is a breach of the condition for which an action of debt upon the bond lies. The words "*then and there*," relate to so much prosecution as shall be in the county court, but do not restrain it. *Vaughan and Norris*. T. 8 G. II. 137
2. Declaration in replevin for taking a gross number of different articles without specifying how many of each, held good on motion for arrest of judgment, by reason that the avowant had avowed the taking. *Bern & Ux' and Mattaire*. E. 8 G. II. 119

**REPLEVIN, (continued.)**

3. Where the avowant in replevin obtains a verdict and the value is subsequently ascertained by inquiry, under stat. 17 C. II. c. 7, he cannot proceed against the sheriff for the purpose of compelling him to deliver up the replevin bond in order to sue the sureties thereon; but ruled, that the avowant must either pursue the stat. C. II. c. 7, or the old remedy under stat. *Westm.* 2. c. 2. *Combes v. Cole*. H. 10 G. II. Page 352

See PARTIES TO ACTION.

**RESCUE.**

Upon a rescue returned by the sheriff, the court may impose a fine upon the defendant. *The King v. Pember*. E. 8 G. II. 112

**RESIDENCE,***Settlement by Residence.*

See SETTLEMENT, No. 6, 7, 8.

**RESTITUTION.**

See FORCIBLE ENTRY.

*Restitution under stat. 21 H. VIII. of Goods stolen.*

See ACTION ON THE CASE, No. 4.

**RETURN.**

See CERTIORARI, No. 2.

**REVERSION.**

See DEVISE, No. 1.

**REVOCATION OF WILL.**

See WILL.

**ROLL,***Who must carry it in.*

See ATTORNEY.

**S.****SALVAGE.**

See EVIDENCE, No. 6.

**SCIRE**

## SCIRE FACIAS.

1. *Sci. fa.* where it was commanded to the sheriff, that he have there the writ and the names of those by those *whose oaths* he had summoned, &c. the summons not being made on oath, denied to be quashed, but allowed to be amended. *Medley v. Stokes*. M. 10 G. II. Page 321
2. Matter which might have been pleaded in the original action cannot be pleaded to a *sci. fa.* upon the judgment. *Bush, Assignee of Jones, v. Gower*. E. 9 G. II. 233
3. Where *sci. fa.* issues upon an interlocutory judgment, signed after the death of the defendant, the same will be set aside. *Sibbet v. Russell*. M. 9 G. II. 183

See ERROR, No. 5. PLEADING, No. 21. PRACTICE, No. 26.

## SENTENCE OF AN ECCLESIASTICAL COURT.

See EVIDENCE, No. 8, 9.

## SENTENCE FOR A MISDEMEANOR,

*Where not deferred.*

See HUSBAND AND WIFE, No. 3.

## SERVICE,

*Service of Notices, Process, Rules, &c.*

See INFORMATION, No. 4. PRACTICE, No. 11, 12. 27, 28.

## SESSIONS.

Whether the sessions can be compelled to state a case, *Query*. *The King and Inhabitants of Oulton*. M. 9 G. II. 169

## SESSIONS—ORDER OF SESSIONS.

1. Adjudication good, though following a recital. *The Parishes of Chesham in Bucks and Stepney in Middlesex*. E. 8 G. II. 100

SESSIONS—ORDER OF SESSIONS, (*continued*.)

2. The validity of a previous order of two justices, held so far to depend upon the special facts stated in a subsequent order of sessions, that if these be insufficient to maintain the adjudication of the sessions, the order of the two justices, as well as that of the sessions, will be quashed. *The King and Reading*. M. 8 G. II. Page 79
3. The sessions, by an order, stated the special circumstances, and adjourned the farther consideration of a case before them; and, another sessions, by a second order, proceeded to adjudication: held, that a regular continuance was not necessary to appear upon the face of the second order. *Id. ib.*
4. Where two counties are previously mentioned "county aforesaid," is bad for uncertainty. *The Parishes of Chesham in Bucks and Stepney in Middlesex*. E. 8 G. II. 100
5. The order for maintaining a bastard child, must specify in what county it was born. *The King v. Green*. E. 10 G. II. 364
6. In the exercise of their jurisdiction over the appointment of constables, conferred on the sessions by statute by 13 & 14 Car. II. c. 12, the statute must be strictly pursued; thus, an order of sessions for the appointment of constables in *Chepstow*, "for a year or until others are chosen," instead of "until the lord holds his court," held bad. *The King v. Davis*. T. 9 G. II. 282
7. Motion to affirm order of sessions, on the ground that, although it had been removed into B. R. two terms, no proceedings had been had thereon, granted, unless cause shewn before the end of the term.

SESSIONS—ORDER OF SESSIONS, (*continued.*)

term. *The King and Inhabitants of Oulton.* H. 9 G. II. Page 206

See ATTACHMENT, No. 3. BILL OF EXCEPTIONS.

## SETTLEMENT.

1. A service of four years under indentures of apprenticeship for that period, is sufficient to gain a settlement. *The Inhabitants of St. Nicholas and St. Peter's in Ipswich.* M. 10 G. II. 323
2. And although the 5 Eliz. c. 4, make all apprenticeship in corporate towns for less than seven years void, yet indentures for a less time are voidable only as between the parties. *Id.* *ib.*
3. Payment of the land-tax gains a settlement under 3 Will. III. c. 11. s. 3. *Between the Parishes of Armsley and Bramley.* H. 9 G. II. 210
4. A wind-mill is a tenement within the 9 and 10 Will. III. therefore by renting one of the value of £10 a year a settlement is gained. *Between the Parishes of Butney and Benhall.* T. 10 & 11 G. II. 391
5. Children may gain a settlement by living with the mother, [after the father's death] as they may by living with the father [before his death.] *The King and Inhabitants Oulton.* M. 9 G. II. 169
6. A son's residence in a leasehold cottage after his father's death intestate, without the son's taking out administration until after the expiration of the lease, does not obtain a settlement. *Between the Parishes of Widwelly and Farringdon.* T. 10 & 11 G. II. 392
7. A pauper, whose last residence was in a place extra-parochial, and without officers for the poor, cannot be removed thither, as to

SETTLEMENT, (*continued.*)

the place of his last legal settlement. *Between the Parishes of Dalham and Denham.* E. 8 G. II. Page 110

8. The statutes 43 Eliz. c. 2, and 13 & 14 Car. II. c. 12. s. 21, construed to give the justices powers of removal in all extra-parochial places containing more houses than one, with this restriction, viz. so as such places come under the denomination of a vill: and it must be left to the court to judge upon the circumstances what is meant by a vill. *Id.* *ib.*
9. A pauper adjudged a settlement on the ground of a hiring for a year, although it appeared he had been absent during such hiring for three weeks together, without the consent of the master. *Between the Parishes of Northleiton and Eaton.* T. 8 G. II. 181

## SHERIFF.

Rule for the sheriff to bring in money levied by him on *fi. fa.*, granted. *Thompson and Dempster.* M. 9 G. II. 180

See LANDLORD AND TENANT, No. 2. REPLEVIN, No. 3.

## SHERIFFS OF LONDON.

The sheriffs of London do not enter into their offices until the day they are sworn. *Wilkinson v. Salter and Perry, Sheriffs of London.* T. 9 G. II. 310

## SHIPPING.

1. Although it appear that the freight of certain goods shipped on board a general ship usually belongs to the master, yet if he refuse to deliver the same to the consignee

SHIPPING, (*continued.*)

signee, an action for non-delivery lies against the owners on the general custom, and this, although the master do not account to them for the freight.

But then in the case of a special verdict, it must be found that the ship was a general ship; *i. e.* carrying for hire; for the custom need not be alledged in the declaration: facts must be found sufficient to bring the case within the custom. *Boucher v. Lawson.* H. 8 G. II. Page 85

2. The owners or the master are in general liable for necessaries for the use of a ship, if the master order them; but if it appear that the credit had been given exclusively to the owners, and that the master in giving the orders acted merely as their servant, he will not be liable. *Hoskins v. Slayton.* At Sittings after T. 10 & 11 G. II. 376

## SLANDER.

See ACTION ON THE CASE. PLEADING, No. 8.

## SPECIAL JURY,

*Mode of striking a Special Jury in the Absence of one Party.*

See PRACTICE, No. 17.

## STATUTES.

*Decisions, &c. upon Statutes.*

- 13 Edw. I. [*West.* 2. c. 2.] [Second deliverance.] 352  
 ——— c. 46. [Writ of noctanter.] 355  
 ——— stat. 2. [Hue and cry.] 409  
 2 Hen. IV. c. 11. [Suing in the admiralty.] 317  
 5 & 6 Edw. VI. c. 12. [Excommunication by ecclesiastical court.] 190

STATUTES, (*continued.*)

- 5 Eliz. c. 4. s. 31. [Apprentice.] Page 323  
 18 Eliz. c. 3. [Authority to justices in cases of bastardy.] 301  
 43 Eliz. c. 2. s. 19. [Verdict obtained by overseers of the poor.] 138  
 13 & 14 Car. II. c. 12. [Jurisdiction of sessions over appointment of officers.] 282  
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 17 Car. II. c. 7. [Writ of inquiry in replevin.] 352  
 3 Will. III. c. 11. s. 3. [Payment of land-tax as conferring settlement.] 210  
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 7 & 8 Will. III. [Clandestine Marriages.] 57  
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 9 & 10 Will. III. [Settlement by tenement of £10 *per ann.*] 391  
 10 & 11 Will. III. c. 24. [Limitations in error.] 345  
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 9 Ann. c. 30. [Traverses to a return to *mandamus.*] 295  
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 11 Geo. I. c. 4. [Election of a mayor.] 23  
 11 Geo. I. c. 18. [Election.] 261. 307  
 2 Geo. II. c. 20. [Insolvent debtors.] 145  
 5 Geo. II. c. 27. [Proceedings in English.] 5  
 18 Geo. III. c. 30. [Papists.] 91

## STAYING EXECUTION IN EJECTMENT.

See EJECTMENT, No. 6.

STAYING PROCEEDINGS IN  
GENERAL.

See PRACTICE, No. 7, 29, 30, 31, 32,  
33.

## STOLEN GOODS.

See ACTION ON THE CASE, No. 2,  
3, 4.

## STRIKING OFF THE ROLL,

See ATTORNEY, No. 2.

## STRIKING OUT COUNTS.

See INFORMATION, No. 7. INDICT-  
MENT, No. 3.

## PLEADINGS.

See PRACTICE, No. 9.

## SUBPŒNA.

See WITNESS, No. 13, 14.

## SUGGESTION FOR DAMAGES.

See DAMAGES, No. 2.

FOR DOUBLE  
COSTS.

See COSTS, No. 3.

## SUMMONS.

See CONVICTION.

## SUPERSEDEAS.

See COMMITTITUR PIECE. PRI-  
SONER. CHARGING IN EXECU-  
TION.

## SURRENDER.

See BAIL—SPECIAL BAIL.

## SURPLUSAGE.

See EJECTMENT, No. 2. ERROR,  
No. 8. VARIANCE, No. 5.

## T.

## TENANT BY CURTESY.

1. Where a woman, mortgagor, mar-  
ries, and not having redeemed,  
dies, her husband is entitled to be  
tenant by curtesy of the mort-  
gaged premises. *Casburne and*  
*Inglis et al. In Canc. M. 10 &*  
*11 G. II. Page 399*
2. A husband shall be tenant by the  
curtesy of the equitable estate of  
the wife, and the heir at law may  
oblige him, like any other tenant  
for life to keep down interest. *Id.*  
*ib.*

## TENANT FOR LIFE.

See DOWER, No. 1.

## TENDER.

See DECLARATION. ENTITLING  
DECLARATION, No. 1.

## TRADE.

Judgment for the plaintiff in *C. P.*  
upon articles restraining the de-  
fendant from setting up his trade  
within the bills of mortality, af-  
firmed in error, *K. B. Clerke and*  
*Comer. T. 7 G. II. 52*

## TRESPASS.

See COSTS, No. 11. DISTRESS, No.  
1. JURISDICTION, No. 3. PLEAD-  
ING, No. 14, 15, 17. WITNESS,  
No. 1, 3, 4.

## TRIAL,

*New Trial.*

1. The certificate of the judge re-  
porting the matter of fact as ap-  
pearing before him at the trial, is  
conclusive; nor can any affidavit  
be received against it; for that  
would be to try the matter again  
upon

TRIAL, (*continued.*)

upon affidavit. *The King and Poole.* E. 7 G. II. Page 23

2. Finding contrary to the opinion of the judge on the point of law, and not finding a special verdict when the court directs it, are sufficient grounds for a new trial; except where the judge was clearly mistaken in point of law, and also except where it appears upon the record that it is impossible the defendant should have judgment by reason of his bad plea. *Id.* *ib.*

3. Where, after the jurors have retired, one of them leaves the room, speaks to the opposite attorney, and without the consent of the other side, receives a bundle of papers from such attorney, the verdict will be set aside. *Jennings and Warne.* E. 8 G. II. 116

## Countermand of Notice of Trial.

See PRACTICE, No. 20.

## Putting off Trial.

See PRACTICE, No. 21, 22.

*Costs for not going on to try Information and Quo Warranto.*

See COSTS, No. 5. 8.

## TROVER.

See ACTION ON THE CASE, No. 2, 3, 4. EXECUTOR, No. 2.

## V.

## VARIANCE.

1. Where the plaintiff declared upon a contract with the defendant for the repairing his house and par-

VARIANCE, (*continued.*)

ticularly for enlarging one room therein, and the breach assigned was, that he had repaired it ill; and the evidence was, that the defendant had been employed by an insurance office to make good the damage occasioned by fire for a certain sum, and that the plaintiff agreed with him likewise to make alterations in the room, held, that as the plaintiff had not declared upon any general custom to repair, &c. in a workmanlike manner, such variance from the contract laid, and that proved, was fatal. *Witherington v. Buckland.* T. 9 G. II. Page 309

2. Where the plaintiff declared for words of felony, spoken of himself as confederate with another, and the declaration went on to state that the defendant said, "I will hang him," and the words proved were, "I will hang *them both*," held a fatal variance. *Nelson v. Sir Woolston Dixie, bart.* T. 9 G. II. 305

3. A variance between the plaint and the declaration, in an inferior court, is helped by verdict. *Sayer v. Curtis.* E. 10 G. II. 367

4. The *venue* in the margin varying from the description of the place in the declaration, unless referred to in the declaration, held well enough. *Jodderell v. Cowell.* M. 10 G. II. 343, 4

5. Upon *nul tiel* record, the variance objected was, that on the continuance roll, the year of our Lord, and "George the 2d, the now king," were in words at length, and in the record of the proceedings continuing the replication, &c. the year was in figures, but also interlined in words; and that which related to the king was "George, now king;" omitting "the second;" the figures, held not to be variance, but surplusage, and so like-

wise



VARIANCE, (*continued.*)

- wise "the second." *Fisher and Sowerby*. T. 8 G. II. Page 131
6. Verdict will not be set aside for variance between the issue and the declaration containing counts upon a promissory note and for money lent, as to the time laid in the count for the money lent; *aliter* if the variance had been in the date of the note. *Wright and Crust*. E. 9 G. II. 252

See VERDICT, No. 1.

## VENIRE FACIAS.

*Venire*, although *de corpore comitatus*, sufficient. *Merrick v. The Hundred of Ossulston*. H. 11 G. II. 409

## VENIRE FACIAS DE NOVO.

See ERROR, No. 5. VENIRE FACIAS DE NOVO.

## VENUE.

1. If in proceeding against an attorney the *venue* be laid elsewhere than in *Middlesex*, he may move to change it to that county. *Tamen quare?* *Wigley and Morgan*. T. 9 G. II. 285
2. Motion in *Hilary* term, on the usual affidavit, to change the *venue* from *Middlesex* to *Westmorland* refused on account of delay; or to *Yorkshire*, without consent. *Dale and Stevenson*. H. 9 G. II. 210
3. *Venue* refused to be changed from one county to another, where it was sworn that the cause of action arose in a third. *Bristow and Tito*. T. 8 G. II. 135
4. *Venue* changed in an action *qui tam*. *Dovey q. t. v. Powell*. M. 9 G. II. 165

See VARIANCE, No. 4.

## VERDICT.

1. Verdict refused to be set aside on the ground of a material variance, where the issue was entered of *Trinity*, and the record of *nisi prius* was of *Easter* term. *Crofts v. Wilkins*. T. 9 G. II. Page 303
2. "Not guilty," in *assumpsit*, although bad on demurrer, cured by verdict. *Marshall and Gibbs*. M. 9 G. II. 173

See ERROR, No. 6. 9. TRIAL, No. 3. VARIANCE.

## VESTRY MEETING.

The adjournment of a vestry meeting is, of common right, vested in the parishioners at large; not in the vicar. *Stoughton and Reynolds*. T. 9 G. II. 274

## VIEW.

See PRACTICE, No. 15.

## VILL.

See SETTLEMENT, No. 8.

## VISITOR.

See MANDAMUS, No. 7.

## VOTERS.

See CORPORATION, No. 5.

## U.

## UNCERTAINTY.

See SESSIONS—ORDER OF SESSIONS, No. 4.

## UNDERTAKING.

*Attorney undertaking to appear.*

See CONTEMPT, No. 1.

UNICA

## UNICA TAXATIO.

See COSTS, No. 4.

## "UNTIL."

See WORDS—CONSTRUCTION OF WORDS, No. 2.

## USURY.

See PLEADING, No. 26. WORDS, CONSTRUCTION OF WORDS, No. 3.

## W.

## WAIVER OF IRREGULARITY.

See PRACTICE, No. 4. 27, 28.

## WARRANT OF ATTORNEY.

1. A judgment entered up under a warrant of attorney executed by an infant, set aside on motion; but as to a bond given at the same time with the warrant of attorney, the court left the party to his defence on a trial. *Wilmot v. Bye*. T. 10 & 11 G. II. Page 376
2. If a warrant of attorney to confess judgment in C. P. be given by a defendant in custody on process issuing out of K. B. without an attorney being present on his part, the court of K. B. will interfere by way of attachment against the plaintiff and his attorney, the same to lie in the sheriff's office until either satisfaction of the judgment in C. P. be entered upon the roll, or a consent given in that court that the judgment and execution be set aside, with costs. *Woodin and Colledge*. M. 9 G. II. 177
3. Where the party having given a warrant of attorney, dies the same

WARRANT OF ATTORNEY,  
(continued.)

day the judgment was signed, and before the signing, it shall not be set aside. *Fuller and Johnson*. M. 9 G. II. Page 158

See EXECUTION.

## WILL.

Although a mortgage in fee after a devise of the estate is in law a total revocation, yet in equity it is a revocation *pro tanto*. *Casburne and Inglis & Al.* In Canc. M. 10 & 11 G. II. 399

## WITHDRAWING PLEA.

See PRACTICE, No. 16.

## WITNESS.

1. One indicted, but who for want of replication to a plea of *misnomer* is discharged, may be a witness for the other defendants. *The King v. Sherman and Idle & Al.* T. 9 G. II. 303
2. Where the legitimacy of her son is in question, a mother may be a witness to prove her own marriage. *Stapleton and Stapleton*. T. 9 G. II. 277
3. Assault; one joined in the *simul cum* may be a witness if not served with process. *Hill and Fleming*. E. 9 G. II. 264
4. If *A* declare against *B* with a *simul cum*, viz. *C*, *B* shall not be deprived of *C*'s testimony, unless evidence be given of his being some way concerned in the facts, and that process in that action had issued against him, and endeavours used to take him. *Lloyd and Williams*. E. 8 G. II. 123
5. Motion to strike out a defendant in ejectment, he being a material witness, refused. *Berrington d. Dormer*

WITNESS, (*continued.*)

- Dormer v. Parkhurst, Fortescue, and Others.* M. 9 G. II. Page 162
6. Party who supports the suit not to be a witness. *Hopkins, &c. Neal and Another.* H. 9 G. II. 202
7. The maker of a promissory note not allowed to be a witness on an indictment against the payee for perjury, in denying an agreement not to put it in suit against the maker. [*Tamen quare?*] *The King v. Nunez.* E. 9 G. II. 265
8. Wife not a witness, though with consent. *Barker v. Sir Woolston Dixie, Bart.* E. 9 G. II. 264
9. On affidavit that one of the defendant's bail is a material witness for him in the cause, and upon adding and justifying another in his stead, the name of such bail will be struck out of the bail-piece. *Collet v. Jennis.* T. 8 G. II. 133
10. The objection, on the ground of interest, to an elisor named with another to return a jury of freemen, who are to elect a mayor of a corporation, being a witness in a cause wherein the mayor elected was defendant, goes to credit but not to competency. *The King v. Bray.* H. 10 G. II. 358
11. So also as to one of such jury who had so elected the defendant, the mayor. *Id.* *ib.*
12. A paper purporting to be a previous examination of the witness as to the matter in issue, taken before a magistrate, and signed by him, but not by the witness, was not admitted to be read in evi-

WITNESS, (*continued.*)

- dence, in order to discredit him. *Tircman v. Henwell.* T. 9 G. II. Page 306
13. Where the witness attended on his *subpana*, but came too late, an attachment was refused on motion, and the party referred to his remedy by action. *Collier and Morris and Others.* M. 9 G. II. 180
14. Delivery of a *subpana* to a servant, who said he had delivered it to his master, who declared he would attend, not sufficient to ground an attachment against the master. *Wakefield's Case.* M. 10 G. II. 313
- See ATTACHMENT, No. 2. BANKRUPTCY, No. 2. JUSTICES OF THE PEACE, No. 1.

WORDS—CONSTRUCTION OF WORDS.

1. The construction and application of the word "*ipse*" in the plural number. *Dobson v. Dobson and Others.* E. 7 G. II. 19
2. The word "*until*" is a word of exclusion. *Wicker and Norris.* E. 8 G. II. 116
3. The word "*contract*" in the statutes against usury, extends to all personal things. *Bush, Assignee of Jones v. Gower.* E. 9 G. II. 233
- See CERTAINTY. CUSTOM. DE- VISE, No. 7. EJECTMENT, No. 1. ESTATE, No. 1. REPLEVIN, No. 1. SESSIONS—ORDER OF SESSIONS, No. 4.

WRIT.

See CERTAINTY.

FINIS.

